LAW AND CONTEMPORARY PROBLEMS

THE "UNAUTHORIZED PRACTICE OF LAW" CONTROVERSY

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THE "UNAUTHORIZED PRACTICE OF LAW" CONTROVERSY

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Special Editor for this Symposium

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FOREWORD

The grant of exclusive privileges to a licensed profession necessarily involves the exclusion of the unlicensed from their exercise—and, with this, controversy as to the scope of the privileges granted. That problems of this nature should be a major concern of the legal profession today can be best explained, perhaps, by reference to the dynamic, constantly changing nature of legal business and, of course, this, in turn, is but a reflection of the historical and economic development of the institutions which the law serves. Matters which formerly constituted an important part of the lawyer's work have in some instances simply ceased to exist or, at least, to present legal problems. On the other hand, with the increasing complication in industrial and governmental functioning, new types of endeavor have been opened up, and, frequently, have been claimed by lawyers as their own. Still other lines of activity, formerly engaged in almost exclusively by lawyers, have been turned into profitable, specialized businesses by laymen. Under such circumstances, it was inevitable that controversy should develop between the legal profession and the lay groups which had "encroached" or which were seeking a foothold in the same new fields which the lawyers considered as falling within "the practice of law."

The problem does not permit of easy solution. Those criteria which would be practically automatic in their application would not give satisfaction to any group. For instance, if "practice of law" is to be considered as synonymous with what lawyers do (and have done) then its scope is so broad that the multitude of "unauthorized practitioners" would be overwhelming. On the other hand, if the exclusive privileges of the lawyer are to be defined in terms of exclusiveness presently existing, then it would be difficult to find any general type of activity which the unlicensed person does not share with the lawyer to some extent. To the uninformed this whole matter might be regarded as of little concern to anyone except the controversialists, but when it is remembered that complaints are being made by the bar against such diverse groups as accountants, banks and trust companies, abstract and title companies, automobile clubs, insurance and other claim adjusters, collection agencies, notaries public, justices of the peace, real estate men, and undertakers, then it is clear that a large percentage of the public will be affected either immediately or potentially by the way in which these controversies are settled.

It was not until about twenty-five years ago apparently that lawyers first began to

feel apprehensive over the "unauthorized practice" situation. Then it was corporate practice of the law that was considered to be particularly menacing. A lawyer, writing in the *Yale Law Journal* in 1913 under the title, "The Passing of the Legal Profession,"[1] sets forth the manner in which the corporations were taking away the lawyer's business and concludes, woefully: "The lawyer as such is being devoured by his own Frankenstein." At about the same time the bar associations and other groups became concerned with the matter, and the result was a flurry of activity, concentrated largely in New York City and certain other metropolitan centers.

During the 20's there were occasional manifestations of interest in this subject over widely scattered areas—but it was not until after 1929 that the present widespread movement can be said to have begun. Economic depression brought growing discontent to a head, although doubtless the movement would have started sooner or later anyway. Apparently the American Bar Association did not particularly concern itself with the matter until 1930, when its Committee on Unauthorized Practice of Law was appointed. To a large extent this committee has been the directing force in the resulting campaign against unauthorized practice of law, to which great impetus was given in 1933 by the fact that the subject was made one of the four topics of the National Bar Program of the Association, formulated to bring about a greater coordination in the work of the national, state, and local bodies. There are now more than 400 bar associations which have committees on the subject. Their activity may be judged by the fact that in Brand's *Unauthorized Practice Decisions,* a 1937 compilation of virtually all the cases in this field, only the first 98 pages are devoted to decisions prior to 1930 and the rest of the 838 pages contain cases since that date.

In this symposium an attempt has been made to present some of the more general aspects of the unauthorized practice of law problem in its present stage of development, as well as a more detailed study of certain fields of controversy. Naturally, it was impossible to include similar studies on all points of friction, but the three groups chosen, automobile clubs, collection agencies and real estate brokers, in each instance present not only a controversy now existing, but problems typical, in the main, of those throughout the whole subject. The representative of the bar and of the particular lay group involved were requested to develop the factual bases of their respective contentions, a phase of the controversy which has been somewhat neglected for the legal issues which have arisen. The latter have been considered in separate notes dealing with the court decisions affecting each particular field.

The titles of the other articles are perhaps self-explanatory, but a word of comment as to Professor Llewellyn's may be in order. In a sense this article is introductory to the entire symposium for the author seeks to place the unauthorized practice of law problem in relation to the broader social and economic problems which confront the bar in its effort to adapt its traditional methods to a changed and changing society. Professor Llewellyn's proposals for constructive group action reach well beyond the remedies and procedures which have been availed of thus far.

P. H. S.

[1] Bristol, 32 YALE L. J. 590.

AUTOMOBILE CLUB ACTIVITIES: THE PROBLEM FROM THE STANDPOINT OF THE CLUBS

CHARLES C. COLLINS*

In the United States today there are some eight hundred motor clubs with nearly a million members. All but a very few of these clubs are affiliated into one national federation—the American Automobile Association. The A.A.A. motor clubs are civic, non-profit organizations whose purposes are to render service and protection to members and to aid the cause of motoring generally. In carrying out these objectives, many of the clubs perform certain legal or quasi-legal services.

Historical Background

To appraise the problem of law practice from the automobile club standpoint, it would be well to look into the beginnings of the motor club movement and the conditions that prompted them to institute aid in matters affecting the legal rights of members. In 1902, when the A.A.A. was organized, there were but 23,000 passenger cars in the entire nation; there were practically no improved roads and traffic laws were designed for horse-drawn vehicles. Moreover, the car owners in those days encountered a good deal of hostility, particularly in small rural communities, and this hostility was reflected in laws and regulations that either were unduly oppressive, or were even designed, in some instances, to discourage automobile travel altogether.

In order to better the conditions under which they operated, a number of motoring enthusiasts banded together so they could present a united front in working out their problems. The original call that was sent out to motor clubs thirty-five years ago, inviting them to take part in setting up a national organization, stated that one of the principal purposes in joining together was: "Protection of the legal rights of users of motor vehicles". Wholesale arrests for exceeding five and ten-mile speed limits, for frightening horses, for horn-blowing, and for a score of other petty and technical offenses, together with the appearance of the kangaroo court along the roadside with its fee-splitting officials, at length drove the motor clubs to the necessity of retaining counsel and battling against such injustices.

Types of Service

While great progress is being made in the standardization of club services, there is still a lack of complete uniformity and this is quite true with regard to legal

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activities. Generally speaking, however, these so-called legal activities fall into four broad categories:

(1) Sponsorship of legislation deemed to be in the motorists' interest.
(2) Dissemination of information regarding laws affecting motorists.
(3) Providing legal defense for a motorist considered to be the victim of unjust prosecution, particularly where broad public questions are involved.
(4) Attempted settlement of small damage claims without recourse to court action.

As regards the first of these, there has been no question at all about the right of the clubs to engage in such activity. As regards the second, I believe it fair to say that only the most carping critics have raised any question whatsoever as to the right of clubs to distribute information concerning motor laws to members. The other two activities, however, have been the subject of much discussion and will be treated at length in this article.

"Unjust Prosecutions"

The motor club—and, in using this term, I mean the average motor club giving a typical service—is obliged to appear in defense of members in certain cases in which there is "unjust prosecution," in order that the rights of motorists generally may be protected. The club must necessarily appear in defense of these actions by retaining duly admitted members of the bar. What is meant by the term, "unjust prosecution"? It means simply this: the club will undertake to defend a member when the member is faced with prosecution under a law, ordinance or regulation, which the club believes to be detrimental to the public interest. A few concrete examples will illustrate the point clearly.

The management of a motor club in a large city received a flood of complaints regarding the operation of a "speed trap" in a neighboring village. Upon investigation, the Secretary found that more than one hundred motorists were being arrested and fined every week for violating a local speed ordinance. Each arrested motorist was required to post $16.00 collateral and he was led to believe that any attempt to contest the case would result, not in return of any of the money, but rather in an additional fine being imposed. Further investigation disclosed that part of the $16.00 was being distributed in the following manner: The prosecuting attorney received $5.00 whether there was a trial or not; the mayor, who acted as the trial justice, received $3.00; and the two officers making the arrest got $1.50 each. With an average of more than one hundred arrests weekly, these busy, fee-splitting enforcement agents were receiving enormous incomes at the expense of motorists.

The motor club referred the complaints to its attorney who found, upon searching the laws of the particular state, that the mayor was entitled to receive only $1.50 from the town in the event of an acquittal. The case of an individual motorist was defended and appealed to the higher courts of the state on the ground that the mayor, receiving more in the event that he convicted a defendant than he would receive for his services in the event he acquitted, could not be expected to be above

partiality. As a result of this action and the attendant publicity, the legislature eventually changed the law under which this type of court operated and such "speed traps" were abolished throughout the state.

In another case, a motorist was arrested for alleged reckless driving. The justice of the peace, before whom the motorist was haled, found him not guilty but nevertheless required him to pay costs amounting to $2.50. The motorist immediately complained to his club and the Secretary realized that if this practice were allowed to go on, any and all motorists could be arrested for violating some law of this particular village and found not guilty—but still be required to pay costs. The case was thereupon referred to the club's counsel and the matter was taken to court, with the result that this anti-social practice was discontinued.

In still another instance, a motor club carried to the Supreme Court of the United States a case involving what it believed to be unfair tax exactions by a city government. These are but three instances of the many such cases that are handled by clubs through their attorneys on behalf of individual motorists but for the benefit of all motorists. All of these cases are handled by duly admitted members of the bar and are paid for out of the club treasury.

Claim and Adjustment

Many of the motor clubs maintain claim and adjustment departments, usually manned by a club employee who is an attorney. However, in the case of some of the clubs the employee handling this service is not an attorney. There are exceptions, of course, but, generally speaking, these departments handle only claims involving less than $100, they take no action at all regarding personal injuries and do not go into court. The procedure of the average motor club claim and adjustment department is as follows:

The member presents a written report, giving full details of the accident, together with an estimate of the cost of repairs. A letter is then sent to the other motorist involved, requesting him to advise whether he is willing to pay for the damage done. If he replies, the matter is discussed and an attempt made to settle the claim. If he refers the letter to his insurance carrier, the club employee discusses the matter with the insurance carrier's representative and attempts to reach a settlement.

If there is no response to the letter, the club employee will write another letter or attempt to contact the motorist. If he prefers not to make payment, the club member is advised that he must employ counsel to file suit in the event the member wishes to carry the matter further, since the club has done all that it can under the circumstances. In some of the clubs attorneys will represent the members in court in property damage cases where the amount involved is less than one hundred dollars.

When the accident happens while the club member is traveling or touring outside his home state, the claim is sent to the adjustment department of the club in whose territory the accident happened and the same procedure is followed as that outlined above. Whether collection is made or not, the member pays no charge.

Reports from motor club claim and adjustment departments in many parts of the country show that collections average less than $10.00 per case.

Some of the clubs, in an effort to settle small disputes arising from automobile accidents, hold arbitrations in cases where the parties involved agree to this procedure. These arbitrations are presided over by club members; the involved motorists and their witnesses appear and testify, and a decision is rendered by the arbitrators. In this manner many small claims are kept out of courts, already over-congested. These arbitrations are usually limited to cases where less than $100 property damage is involved and never deal with personal injury cases.

The British Clubs

Before proceeding to a discussion of the merits of these activities, it might be of interest to note what the motor clubs of Great Britain do in the way of legal service for members. The British practices are cited because our motor clubs are closely comparable with theirs; our laws are based on their laws, and our ethics to a large extent are taken from, or grounded upon their ethics.

The wide extent of the legal services provided by the English clubs is succinctly set forth in the following extract from the "Handbook" of the British Automobile Association:

LEGAL DEPARTMENT. FREE LEGAL DEFENSE

Free Legal Defense (by the Association's solicitors) is afforded (a) to every car member and owner-driver, (b) to every member who is the owner-driver of a cyclecar, and (c) to every motorcycle member in any proceedings under the Motor Car Act and Roads Act in Courts of Summary Jurisdiction in the United Kingdom.

A few of the offences covered by the Free Legal Defense Scheme are:

DRIVING recklessly or to the public danger.
EXCEEDING the speed limit.
FAILURE properly to illuminate identification plates.
ALLOWING identification marks to be obscured.
NON-COMPLIANCE with the regulations relating to registration, licensing, etc. etc.

Experience has shown that despite the exercise of every caution, the most careful motorist is liable to be charged with having committed an infringement of the law. This is especially so in the case of small technical points.

At one time many cases were allowed to go undefended in view of the trouble and expense involved in retaining the services of a solicitor, and this, of course, was prejudicial not only to the interest of the individual but to those of the motoring community. For that reason, and to render members the maximum of assistance, the Free Legal Defense Scheme was inaugurated. The scheme has been in force since July 1909, and the continued high percentage of successful defenses is a testimony to the value of this benefit. All that the member has to do is to place the conduct of any summons of the nature referred to in the hands of the Association, when the Association's solicitors go carefully into the evidence and defend the case.

. . . The Committee, however, reserves the right to withhold the benefit of Free Legal Defense in any case where in their view the circumstances are such as to render this course desirable.

. . . The Association has extended its Free Legal Defense Scheme to include Free Legal Assistance by the Association's solicitors in approved civil cases arising out of the use or ownership of privately owned motorcars or motorcycles.

This extension really aims at giving the greatest possible assistance in claims and disputes not ordinarily covered by insurance, and to protect members against the too-frequent attempts of the unscrupulous to deprive the motorist of his rights.

FREE LEGAL ADVICE

Every member of the Association is entitled to the advice of the Legal Department on any matter directly arising out of the use and ownership of motorcars or motorcycles.

Disputes over buying and selling of cars, liability for accidents on the road, claims for damage in transit, responsibility of garage proprietors, queries on the Motor Car Act, and the various regulations governing registration, licensing, storage of petrol, etc., are only a few of the matters in which the Association is able to help members in any advisory capacity. It is frequently possible to assist in securing a satisfactory settlement of cases and avoid the expense and inconvenience of litigation.

The Royal Automobile Club renders legal services similar to those of the British Automobile Association. As a result of the affiliation of the A.A.A. with the British clubs, a member from the United States traveling abroad can get all these services which he can not get at home.

It no doubt will be à surprise to many in America that the British legal profession, which carefully guards the prerogatives of its members, offers no objections to this broad and sweeping type of legal service for motor club members. Questioned on this point, Messrs. Amery-Parkes & Co., of London, general counsel for the British Automobile Association, made the following comment:

"We have never heard any objection being taken to an Advocate being retained for the Defense of a motorist, or indeed, even of a criminal, by a third party. Still less can we conceive it possible that any objection would be taken to an Advocate briefed by an organization of which the Defendant was an Association member in circumstances where the member paid the subscription to the organization, one of the terms of which was that he would be entitled to free legal defense."

In brief, the motor clubs of Great Britain provide legal services far beyond the scope of those provided by clubs in the United States, with the full sanction of the members of the legal profession.

The Motor Clubs' Viewpoint

The services performed by the motor clubs in protecting the legal rights of their members are provided because the members have a right to, and demand, such services, and because such services are not obtainable except through a motor club.

It is not now, nor was it ever, the intention of the automobile clubs to engage in the legal business or to take away from the practicing lawyer any business which he cared to handle or which he might profitably handle. As a matter of fact, the reverse is true. The activities of the clubs in connection with cases involving unjust

prosecutions have in many instances resulted in providing practicing lawyers with cases that otherwise would not have been litigated.

As already stated, there is no question at all as to the right of the motor clubs to sponsor legislation in the motorists' interest. As a result of working through their organizations, the motorists have brought about almost nation-wide adoption of financial responsibility legislation; they have secured at least a measure of uniformity in traffic regulations of the various states; and they have defeated, time and again, proposed laws that would have been unduly restrictive. Individually, the motorists could have done nothing along these lines; collectively, they have accomplished much.

With regard to dissemination of information on laws affecting motorists, it is obvious that the average practicing lawyer does not have in his library all of the motor vehicle laws of the various states; he does not have at his fingertips the details of such matters as guest suit laws, reciprocity regulations, non-resident service of process laws, and the other complexities that have resulted from regulation by federal, state and local governments of motor transport; and he can scarcely hope to keep abreast of the thousand or more measures passed by the legislatures at recurring sessions affecting motor vehicle operation. Dissemination of this important information to members and non-members alike is a regular service of motor clubs and is possible only because of their organized effort.

Turning to the matter of unjust prosecution, we believe that motorists as a class have an inalienable right to protection against injustices. As individuals, they have no way of obtaining relief. The amount of money involved in any one individual case is usually small, the grievance not severe—but the interests of motorists as a class may be very adversely affected. The only recourse, then, is for the club, acting on behalf of all motorists, to champion the cause of one individual, secure counsel for him and pay the expenses of the trial from the club treasury. In the cases mentioned above, in which clubs defended unjust prosecutions, the actual amounts of money involved were so small as to be practically negligible—in one case, $16.00, and in another, $2.50. Clearly, no individual motorist can afford to thresh out a legal problem before the courts for a matter of sixteen dollars or so, but motorists as a whole can afford to carry matters affecting their common interests to the courts and, moreover, demand the right to do so. The sole way in which this is possible is by cooperative action through their motor clubs.

If our American legal set-up provided some means whereby test cases involving wide public interest could be settled in the courts without placing a heavy burden of expense upon a single individual, there would be little necessity for the clubs to handle these unjust prosecution cases. As the situation is now, however, this phase of the motor clubs' activities must be continued or motorists as a class will be left without recourse to the courts in matters affecting their broad legal interests.

The claim and adjustment service of the clubs, on the other hand, provides aids

for the motorist individually rather than for motorists as a group. As pointed out earlier in the article, the operations of the claim and adjustment departments, generally speaking, involve only damage claims of less than $100. They do not deal with personal injury cases and the average recovery is less than $10.00 per case. There are two primary reasons why the clubs feel they are not only justified, but obligated to render this personal service to members: first, the amounts involved are so small as to make it unprofitable for the motorist to employ his own attorney to handle the case; second, they believe this activity to be merely an attempt to reach an amicable agreement in small property damage cases.

It seems hardly necessary to labor the point that cases which result in average collections of less than $10.00 are not within the scope of the practicing attorney. In the majority of the damage claims handled by clubs, the amount claimed would hardly equal the attorney's fee and the amount that can reasonably be expected to be recovered would be substantially smaller than the attorney's fee.

Following is a schedule of attorneys' fees representing the average of the minimum fees suggested by the lawyers of Missouri in response to a questionnaire sent out by a committee of the bar association of that state[1]:

Cities over 100,000

Trials in J. P. Courts	$25.00
Trials in Circuit Court	$125.00 to $150.00
Appearing as Local Counsel, Circuit Court	$75.00
Where per diem charge is made for:	
1. Appearance in Circuit Court	$50.00 to $75.00
2. Office work	$50.00
Drawing Simple Contract	$25.00

(Other fees reported for abstracts, drawing wills, etc., are not enumerated here, as they can have no possible application to this question).

Cities of 50,000 to 100,000

Trials in J. P. Courts	$25.00
Trials in Circuit Court	$50.00
Appearing as Local Counsel, Circuit Court	$50.00
Per diem charge:	
1. Circuit Court	$30.00
2. Office work	$25.00
Drawing Simple Contract	$10.00

Cities Having Less than 50,000

Trials in J. P. Courts	$10.00
Trials in Circuit Court	$50.00
Appearing as Local Counsel, Circuit Court	$25.00
Per diem charge:	
1. Circuit Court	$25.00
2. Office Work	$25.00
Drawing Simple Contract	$10.00

[1] (1934) 5 Mo. B. J. 225.

While set schedules are the exception rather than the rule, it is true that the Missouri schedule is indicative of the fees the average claimant may expect to pay. It is obvious that he is not going to employ counsel and take to court a case that gives promise of returning less than half the money he will pay his attorney. His only alternatives are to suffer the loss or depend upon his club to reach an agreement on his behalf.

Anything that the motor clubs can do through their claim and adjustment departments to settle the differences arising from the daily operation of nearly 30,000,000 passenger cars redounds to the benefit not only of the motorist but also of the already over-congested courts, and does not take business away from lawyers because it is business that does not involve enough money to warrant counsel to devote time necessary to handle the cases.

To recapitulate, then, the motor clubs are providing services to motorists which they demand as their right but which are not available to them except through their motor clubs. If these services were to be discontinued tomorrow by every motor club, the legal profession would gain nothing; rather, the effect would be injurious for many attorneys would lose an important and wholly legitimate source of revenue and the cases involving interests of motorists as a whole, and which are handled by duly admitted members of the bar, would not be litigated at all.

It goes almost without saying that the legal profession is strongly represented throughout the many ramifications of motor club organization. Not only are thousands of lawyers among the oldest and most valued members; not only are attorneys regularly employed by the clubs; but they also hold high positions as officers and directors of the clubs; they hold important posts on the committees and governing bodies of the national organization; and their counsel and advice is enlisted in preparing model legislation and shaping the policies of the organization in its battle for the motorists' welfare. Many of these lawyer members of A.A.A. clubs use the service themselves and very frequently send their clients to the clubs. Scores of prominent directors of A.A.A. clubs are regularly pleading cases before the highest courts of the states and before the Supreme Court of the United States. Is it conceivable that this type of lawyer would condone anything that he believed to be not in the public interest or detrimental to his own profession?

The automobile clubs are not taking away from lawyers any business that is profitable; they have no wish to enter into the practice of law; and desire merely to continue their present services in protecting the motoring public. In the final analysis, it may be said that the determination of the extent to which the motor clubs can and should afford this protection is a matter for the public itself to determine.

The motor clubs feel that in thus protecting the motorist, they are acting properly within their own sphere and providing the motorist with services he could not get elsewhere. Organized effort for the promotion of common interests and welfare is an integral part of the American system and, lest we forget, it is becoming more so every day.

AUTOMOBILE CLUB ACTIVITIES: THE PROBLEM FROM THE STANDPOINT OF THE BAR

CHARLES LEVITON*

Inherent in any penetrating inquiry concerning a legal problem we find of necessity a road which travels from the concrete to the abstract and from the particular to the general. It is the usual method of testing results obtained in the sciences. While it is a commonplace that law cannot be named a science and while it is more appropriately termed an art, it may be stated that the process of human reason has as important a role in the solution of legal problems as in biology, chemistry or any other field of human thought and endeavor. Since very few questions giving rise to legal discussion are simple, in a search for the correct answer it becomes necessary to test general laws which may agree, overlap or conflict, and, as in the sciences, the application of a tentative solution should be tested with actuality, both in its immediate and its ultimate bearing. In such a discussion it is of the essence to strip the issue to its fundamentals and to discard the outer garments of apparent expediency, no matter how attractive they may appear.

The State of Illinois was the first jurisdiction wherein a court of last resort held that the activities of a motor club supplying legal services to its members was contrary to public policy. This decision, *People ex rel. The Chicago Bar Association, Relator, v. Motorists' Association of Illinois,*[1] was rendered on December 22, 1933. It was followed by similar decisions in other jurisdictions and by two other cases in Illinois, *People ex rel. The Chicago Bar Association v. Automobile Club of Illinois,*[2] decided at the October term, 1934, an unreported decision, and *People ex rel. The Chicago Bar Association v. Chicago Motor Club.*[3]

CONDITIONS LEADING UP TO THESE DECISIONS

The background of the decisions both in Illinois and elsewhere does not show a history of precipitate, unconsidered, or selfish action on the part of the lawyers who instituted the proceedings. On the contrary, for many years the scope of the activities of the motor clubs had been growing and expanding in services, as well as in membership. The Chicago Motor Club had boasted of a membership of 60,000, the Motorists' Association of Illinois, 50,000 and the Automobile Club of Illinois some 10,000. All over the country automobile clubs and associations had been for many

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[1] 354 Ill. 595, 188 N. E. 827.

[2] Sup. Ct. Ill., Docket No. 21962.

[3] 362 Ill. 50, 199 N. E. 1 (1935).

years increasing their activities, intensively soliciting membership and advertising heavily, as an inducement to the public, that legal services, in addition to all of their other facilities, would be rendered without further cost except the cost of membership. When the complaints against the motor clubs were presented to the courts, the essential question for decision was one of public policy, and in arriving at a decision, the courts were called upon to find whether or not it was in the public interest that automobile clubs practice law.

To assist the courts in arriving at a conclusion, there was presented to them, in detail, the history of the organization and activities of the clubs and of the services they rendered their members. The Chicago Motor Club was a pioneer in its field. There were at least three other motor clubs in the State of Illinois which patterned themselves more or less after the Chicago Motor Club. For an understanding of the situation, a brief statement will be given as to a typical automobile club picture and in this survey there can be taken for laboratory examination the operations of the Chicago Motor Club now on record in the courts of Illinois.

This organization is selected because of its prestige, its success and its comparatively high standards, as well as because of the ability with which its counsel presented its contentions. These were so persuasive that two of the seven judges dissented from the majority opinion, departing from the unanimity theretofore obtaining in the preceding cases.

The Chicago Motor Club was a "not for profit" corporation organized in 1914 under the laws of the State of Illinois. However, in the opinion of the writer, the fact that the club was incorporated is as irrelevant as its ostensible designation "not for profit". This discussion will cover automobile clubs or associations whether they are in corporate form or not. It is not believed that the dress is of the essence. If their law business tend on the whole to the well-being of the public, they should be encouraged. If they do not, they should be suppressed.

THE LEGAL ACTIVITIES OF AUTOMOBILE CLUBS

The Chicago Motor Club gave a varied service. It gave mechanical first aid and towing service and issued a bail bond guaranteeing appearance of any member arrested for a motor vehicle violation except for driving while intoxicated, or a felony, established touring and road signs, and was active in accident prevention work. It issued a monthly publication called "Motor News," and claimed that as members of the club, club members who placed their automobile insurance with the Inter Insurance Exchange of the Chicago Motor Club would have savings of 20% and that the insurance policy so issued was a very advantageous one in many respects. It also represented the motorists in combating legislation detrimental to the car owner. It described its legal service as follows:

> Members are always free to consult the legal department in any of their troubles concerning the use or ownership of their automobiles. In Cook County the attorneys employed by the club devote their entire time to serving members. In the territory outside of Cook

County reliable firms of attorneys are retained to represent members. Should you be arrested for any alleged violation of the motor vehicle law, you may call the Legal Department and one of our attorneys will conduct your defense in court. The handling of property damage cases is another service rendered by the legal department.

Its membership fee in Cook County, including the emblem, totaled $16.00. In its publication, the "Motorists' Service," an entire page of the magazine was devoted to a large photograph of one of its counsel standing and addressing other attorneys seated at a table, behind which were shown many book cases containing law books. Above this photograph was the following recitation, under the heading in large capitals:

A LEGAL STAFF AT YOUR SERVICE

In Cook County the attorneys employed by the club devote their entire time to serving members. In the territory of the club outside of Cook County firms of attorneys are retained to represent members.

Should you be arrested anywhere in the territory of the club for alleged violation of a city ordinance or of the motor vehicle law, call the club if you are in Cook County; if you are in any other part of the territory, call the firm of attorneys that represents members in that particular county. You will find a list of these attorneys published in every issue of *Motor News,* the monthly magazine of the club. In addition to the actual handling of cases in court, involving violations of the motor vehicle act, the legal department spends much time in giving advice to members.

The handling of property damage cases is another service that is rendered by the legal department. If your car is damaged or if someone sues you for property damage, call on the legal department. Attorneys for the club will try to make an adjustment for you, and if necessary will handle your case in court.

Speed trap operators, fake motoring organizations, swindling concerns selling to the motorists and crooked officials, all find the legal department an able and determined foe. Ready at all times to co-operate with honest officials, the legal department, nevertheless, refuses to condone corruption on the part of any arresting agency.

The relations of the legal department with a majority of the magistrates have been extremely friendly and the honest officials are just as anxious as the legal department that the spotlight be thrown on the activities of grafters who prey upon motorists under the cloak of law and authority. This friendly co-operation has made for better motoring conditions for the entire driving public.

Another one of these large magazine pages contained another large photograph exhibiting various stenographers at their desks, together with other personnel of the law office of the club and the general counsel. Underneath the photograph was the following recitation in very large black type:

81 ATTORNEYS AT YOUR SERVICE

to Represent You in Automobile Damage of Traffic Violation Cases

If your car is damaged or someone sues you, call the legal department. If necessary, Club attorneys will handle the case in court. Should you be arrested for alleged violation of vehicle laws or city ordinances, call a Club attorney.

The Club had submitted a statement to the Chicago Bar Association setting forth the extent and complexity of its legal activities. The detailed statement supplied by the Club sets forth the following:

The services of the legal department of the Chicago Motor Club may be outlined as follows:

A. Advice and Information as to:
   1. Local and foreign laws and regulations.
      a. Speed regulations.
      b. Licensing laws.
      c. Touring permits.
      d. Provisions regarding sale, transfer and registry of motor vehicles.
      e. Compulsory insurance laws, financial responsibility and drivers' license laws of other states.
      f. Provisions regarding size, weight and equipment.
      g. Income tax deductions on automobile expenditures.
      h. Customs regulations.
   2. Rules of the road.
   3. Liabilities and rights arising out of automobile accidents.

B. Legislation.
   1. Drafting of proposed bills.
   2. Analysis and criticism of pending bills.
   3. Legislative surveys, research and compilations.

C. Investigations and Prosecutions.
   1. Misfeasances and oppression by police and other officials.
      a. Speed traps.
      b. Unjustifiable arrests.
      c. Assaults, batteries and false imprisonment of motorists.
   2. Racketeering organizations and confidence games.
      a. Illegitimate insurance schemes.
      b. Dishonest finance companies.
      c. Fly-by-night auto radio companies.
      d. Fake "motor clubs."
      e. Fake "police benefit associations."
   3. Dishonest practices.
      a. Selling adulterated gasoline.
      b. Selling short measure gasoline.
      c. Fake service coupon rackets.

D. Education.
   1. Information regarding new legislative requirements or regulations
   2. Interpretation of motor vehicle laws.
   3. Safety campaigns.
   4. Public addresses and publicity relating to traffic regulations.

E. Claims.
   (Property damage claims only, both plaintiff and defense.)

F. Representation in Court.
   1. Civil cases.
      (Property damage claims only, both plaintiff and defense.)

2. Traffic arrest cases.

(Traffic and motor vehicle offenses only, excluding driving while drunk or any other offense involving moral turpitude.)

a. Defense on plea of not guilty.

b. Pleas of guilty and payment of fine without member's appearance in court.

From the statement submitted by the Club it further appears that on February 18, 1922, the legal department of the respondent was handling 1053 claims. The number of claims had increased until in 1931 there were 8640 claims handled with a total collection of $107,075.43. In 1929 it handled 2299 arrest cases, the fines totaling $8,888.00. In 1931 in the City of Chicago 1235 arrest cases were handled with total fines imposed of $3,032.35. In 1930 in what the Club designated "country towns" it handled 2260 cases, wherein the total number of fines imposed was $16,958.00, and in 1931, 2027 cases were handled wherein the total amount of fines imposed was $13,194.95.

The answer of the respondent in the *Motor Club* case set forth that in 1931 there was a total of 3262 arrests of which 758 or 23.23 + % of the members were discharged; that the fines against the remaining 76.77 — % averaged $6.50 for charges heard outside of Chicago and $2.45 for city cases.

The facts above detailed in this case history speak for themselves. Not only was the Club engaged in the institution of property damage suits and the defense thereof, but it was also engaged in a blanket undertaking to defend certain types of criminal cases involving traffic violations, in prosecution of unjustifiable arrests, and of misfeasances and oppression by police and other officials, as well as the prosecution of illegitimate insurance schemes, dishonest finance companies, the selling of adulterated gasoline and other doings of malefactors. In addition, it not only gave legal advice as to local and foreign laws and regulations, but it also gave advice as to income tax deductions on automobile expenditures, customs regulations and liabilities and rights arising out of automobile accidents.

Thus we can see that the Motor Club in its legal operations covered many fields of law; the law of contracts, the law of torts, the law of personal property; the giving of advice in personal injury cases and criminal law and the actual conduct of cases in court. It gave advice on federal income tax and customs regulations, personal property problems covering the proper methods of sale and transfer of automobiles and a host of other fields. Its lawyers were competent and its services in legitimate fields were efficient.

Undoubtedly there exist laymen to whom the prospect of securing such service for such apparent fees would seem most alluring and salutary. To one schooled in the traditions of the profession it is difficult to contemplate the scene without shock; 60,000 clients had been secured by broadcast solicitation, and in the circular distributed by the Club there was widely distributed extremely aggressive advertising of the Club's legal staff. Moreover, the Club gave a remarkable undertaking,

to-wit, it undertook to defend its members wholesale for an indefinite number of misdemeanors which might be committed by the members in the future.

Individual attorneys may well be disbarred for undertaking the defense of a crime in advance. The evils of this plan and the plain results of the undertaking are amply shown by the record furnished voluntarily by the Motor Club. In spite of its prestige and authority, of its competent representation, of its annual income of not less than $900,000.00, of its prosecution of those magistrates who had been engaged in terrorizing of motorists for profit, 76.77% of its members in the year 1931 out of all its members arrested were found guilty. When we consider that in a criminal case, a mere preponderance of evidence is not sufficient to convict, but that the defendant must be found guilty beyond a reasonable doubt, that many cases are dismissed, nolléd or abandoned for one reason or another, without regard to the merits of the case, the statistics offered by the Motor Club are astonishing. Can it be to the public interest to commercialize the defense of members of an automobile club with the result that the vast majority of the members are found guilty in cases where they have been arrested? Is it to the public interest that legal representation should be procured for such a cause and in this method?

THE REAL PUBLIC INTEREST

Statistics showing the increasing annual slaughter by automobiles taking place in Chicago, as well as elsewhere, do not seem to indicate that the prime necessity of motorists is to secure defense against future unjust accusations. Except in a few isolated instances in small communities, it is a matter of common knowledge and known to every automobile driver, that the instances where he has been wrongfully arrested for violation of automobile speed laws and regulations are extremely rare. Let his conscience advise him as to the number of infractions that he has committed and for which he has escaped the penalty.

What is actually needed is not greater tenderness to the violators of the law, but more caution on the highways, more penalties and a stricter application of the law. That this is evident appears from statistics published from time to time and from various essays on the subject, of which an article published in the June, 1935 issue of *Harper's* is typical. This issue contains a discussion entitled "Why Automobile Accidents?" by William Junkin Cox,[4] a distinguished traffic engineer.

The author shows that in 1926 commercial vehicles involved in fatal accidents numbered 795 and in 1934 they numbered 759, a 5% decrease, whereas in 1926 private passenger cars involved in fatal accidents numbered 1291 and in 1934 they numbered 2233. The number of private passenger cars involved rose two and one third times as fast as registrations rose, while the number of commercial cars decreased.

[4] Mr. Cox was formerly traffic engineer of the National Bureau of Casualty and Surety Underwriters, New York, member of consulting staff of the First National Conference on Street and Highway Safety, member of the Statistics Committee of the National Safety Council, member of Mayor's Traffic Commission of New Haven, and of the New Haven Safety Council, and a director of the Eno Foundation for Highway Traffic Regulation.

Commercial-car operation became safer as passenger-car operation became more dangerous.

From additional statistics given in the article, it is indicated that commercial drivers showed an actual decrease in fatal accidents, coupled with some increase in registrations and a large increase in speeds. With smaller increases in both speeds and registrations, private passenger cars during the period from 1926 to 1932 showed five times as great an increase in fatal accidents.

The conclusion of the author is that the commercial driver knows that if he has an accident, no matter how indifferent the public authorities may be, his employer may feel differently, since although insurance be carried, the rate will depend to some extent upon the accident record. Strange as it may seem, the fear of losing his employment operates upon the truck driver so as to make him drive much more safely than the driver of the private car. The inevitable conclusion drawn by the author is that where there has been a direct incentive not to have accidents—a direct penalty attached to culpable accidents—accidents have decreased; that a large proportion of accidents can be eliminated by providing certainty of punishment for the violations which caused them.

Thus it can be seen that direct public interest aside from all other considerations on this particular issue demands not that defendants in traffic violations be defended automatically at a cheap price by a regiment of skilled attorneys supplied by a powerful and wide-spread organization, but rather that the penal laws be enforced promptly and consistently. Under these circumstances, how can it be said that the motor clubs have contributed to the public welfare?

We have gone somewhat into detail in this matter. The perspective is an object lesson covering the entire question growing out of practice of law by laymen and by lay agencies. The direct commercialization of legal services must of necessity, as we have seen, not only lower the standards of the legal profession, but in the long run, since the objective is business and not justice, result in detriment to the community. Lawyers are governed by codes of ethics, standards and traditions which have been painfully accumulated for many centuries. When they violate these standards they are subject to discipline. From such discipline laymen are immune. The least that can happen to a lawyer who attempts to commercialize his profession is the general contempt and disapprobation of his profession and of the public acquainted with his activities. For many the relationship between a lawyer and his client has always been deemed sacred in the real sense of the word. To state that the wholesale business of handling litigation, and the intensive commercial advertising of lawyers, can serve a useful purpose, is to state an absurdity.

"NOT FOR PROFIT"

As for the "not for profit" designation of the corporation, that description need not be taken very seriously. It was undoubtedly for the profit of its members or they would not pay its dues and initiation costs. It was undoubtedly for the profit

of the attorneys, who through its advertising were enabled to secure employment. It was undoubtedly for the benefit of those who controlled the allied insurance services. Those who are managing motor clubs in general conceivably gain profit through their employment, through their connected insurance features, through their tire sales and through the charges they make for their towing and similar services.

The lawyers of the Chicago Motor Club were also lawyers for the Inter Insurance Exchange and the Chicago Motor Club included as part of its services this insurance department. They were both housed under the same roof, and the club offered an opportunity, for additional premiums, to secure the services of its insurance department. It gave such coverage as fire, theft, public liability, property damage and collision and windstorm.

The entire situation has been clarified by a statement in the brief filed in the Supreme Court of Illinois by the Chicago Motor Club, where, in an effort to distinguish the Chicago Motor Club from the Motorists' Association, it is said: "This organization is of comparative recent origin and does not have the record of public service and performance to which the Chicago Motor Club can point. In an effort to compete with the Chicago Motor Club it became necessary for its promoters to represent to the general public that they were offering more in the way of services and consequently its advertising went to much greater lengths." It is further stated in the brief: "We seriously question whether the Motorists' Association, now defunct, could have met the test of rendering service in the interest of the public welfare. The promoters and sponsors of practically all of the motoring organizations which have sought to duplicate the services rendered by the Chicago Motor Club have been those who thought they saw an opportunity for private gain and profit." Like the Chicago Motor Club, all the other clubs operated under "not for profit" charters.

Strange to say, in the City of Chicago, there were published two articles publicizing an opposite viewpoint. They were both by the same author, Mr. Henry Weihofen, an instructor at the University of Colorado School of Law. The first article appeared in the December, 1934, issue of *The University of Chicago Law Review*, and was entitled "Practice of Law By Non-pecuniary Corporations: A Social Utility."[5] The learned author contended that the inhibition against corporations practicing law should apply only to business corporations and not to corporations organized not for profit. In this connection it may be said that a true corporation not for profit may be a social club, a charitable society, or some other institution wherein the economic motive is absent. It is plain that the designation of the Motor Club as a non-profit corporation is a misnomer.

The article was published while the Chicago Motor Club case was pending before a Commissioner appointed by the Supreme Court. We shall pass over the author's discussions concerning the statutory and constitutional rights of the Motor

[5] (1934) 2 U. OF CHI. L. REV. 119.

Club therein urged by him. It may be stated that these constitutional rights and issues, as well as any question of the restriction of the power of the courts over unauthorized practice, have been before the Supreme Court of Illinois several times. Furthermore, the Supreme Court of the United States has refused to hear similar contentions not only when they arose in Illinois, but where *certiorari* was sought from decisions of courts of last resort of other states wherein there was defined the practice of law and the unauthorized practice thereof was punished or enjoined. We will not cite authorities as to either one of these points—it suffices to say that the courts have acted so many times that the matter is no longer a debatable question. Whatever force there may be in the statutory and constitutional propositions advanced by the learned author, the courts at any rate have decided otherwise.

We are relegated then to the discussion set forth by the author under the heading of "The Consideration of Public Policy." The writer took an active part in the presentation of the Chicago Motor Club case. It is unfortunate that Mr. Weihofen made no effort to consult with the relator, The Chicago Bar Association, concerning the matters and things then pending before the Supreme Court of Illinois, and apparently ignored The Chicago Bar Association's contentions, good or bad. Some such investigation might have avoided some misapprehensions on the part of the author. For example, it is declared that it was stipulated that the services which the lawyers for the Club performed were unremunerative to lawyers in private practice, although the stipulation contained no such recital. The recital contained therein was that the Motor Club *claimed* that the services were unremunerative, etc., and *per contra* it appears from the record that the Club had no difficulty in securing plenty of lawyers outside of Chicago who were employed by the Club at a fee of $15.00 a case.

Is it to the public interest that the Motor Club should attend at inquests, a service which can look forward only to the defense of criminal or civil liability? Is it to the public interest that petty claims arising from collisions usually covered by insurance should be automatically resisted; that violators of the traffic laws who ordinarily would not employ an attorney to defend them should automatically secure a defense? Is such stirring up of litigation a public service? It is urged in the article that there should be a socialization of legal services as in medicine and that the people are entitled to cheap legal service. It is safe to say that the vast majority of the legal profession is under-paid, and not over-paid. The number of lawyers now reported to be accepting relief as indigents from the federal government in New York City alone is almost unbelievable.

An attempt is made by Mr. Weihofen to state that since the motor club's practice of law has been declared illegal, legal aid societies are, therefore, also violating the law. He states that no distinction exists, but the distinction is very clear. As we have seen, the Chicago Motor Club itself has admitted that the other "non-profit" motor clubs were organized for purposes of profit. The services of legal

aid societies are of an entirely different nature. They are rendered only to the indigent. The services of the Motor Club, on the other hand, were rendered not to the indigent, but to those who were so little impoverished as to be well able to own and operate automobiles for their private purposes, and to pay the city and state licensing fees and the dues and charges of the club to which they belonged. Why wholesale legal services to such people is in the public interest still remains to be seen. The stirring up of petty litigation where property damage is involved that would ordinarily be dismissed, disregarded or compromised, the wholesale presentation of defenses in cases where 76% of the defendants have been found guilty is surely not in the public interest.

In his later article published in the February, 1936 issue of *The University of Chicago Law Review,* Mr. Weihofen has attacked the decision after its rendition under the caption "Practice of Law by Motor Clubs—Useful but Forbidden."[6] One of the chief points of attack is not that the practice by motor clubs has been condoned or approved of in any court of this country, but that it is being indulged in in Great Britain. The remarkable statement is made: "A practice to which objections are considered inconceivable in England cannot be so clearly bad as the Illinois Supreme Court implied." Many thoughtful people have the most intense admiration for the juridical institutions of Great Britain, but to condone a practice because it is current in Great Britain, although nowhere approved by any court there or here, is quite far fetched. Incidentally, in this article, as in his prior discussion, Mr. Weihofen also complains of the inhibition of the activities of tax associations. These activities which also have been lauded as in the public interest by the author were condemned in *People v. Association of Real Estate Taxpayers.*[7] This "not for profit" concern, whose activities were ended by the Supreme Court of Illinois, precipitated one of the worst fiscal muddles which has ever occurred in the County of Cook. Its members numbering many, many thousands were advised to withhold the entire tax levied against their real estate and not even to pay a minimum, because of an alleged technicality in the spreading of the assessment. Was this in the public interest?

Even in the brief of the Chicago Motor Club in an attempt to distinguish the case, it was stated: "It was extremely doubtful whether the Association of Real Estate Taxpayers was rendering any public service or was acting in the interest of the public welfare because its activities tended to cause the withholding of tax payments, thereby crippling the various branches of local government." Mr. Weihofen states in his introduction that: "The Anthropologists have shown that ethical and moral values vary from time to time and from place to place. There is nothing so heinous but that it has been considered proper and even obligatory for moral standing in some ethnic group. . . . It seems that the code of ethics for the legal profession is no exception to the rule." He thereupon points the moral by indicat-

[6] (1936) 3 U. OF CHI. L. REV. 296.

[7] 354 Ill. 102, 187 N. E. 823 (1933).

ing that what is considered ethical in Great Britain is most monstrously deemed unethical by the Supreme Court of Illinois.

A search of our decisions fails to disclose that the bench or the bar has approved at any time of the wholesale advertising of lawyers, the broadcasting of replicas of their photographs, the engagement in advance of retainer for defense against actions brought for violation of the penal code, or that there has ever been approval either by the bench or bar of the divesting of lawyers of their independence and their subjection to lay authority and lay direction. When lawyers are socialized it will be an evil day for the body politic. That legal aid should be rendered to the indigent has nowhere been denied, but to propose that the profession should be subjected to lay authority or should be commercialized or subjected to the social authority of the state bodes ill. It may not be inappropriate to ask those who advocate such action to cast their eyes over the European dictatorships and see what has happened to the profession.

THE AUTOMOBILE CLUBS AND THE COURTS

EDWARD B. BULLEIT*

Until fairly recently it had apparently been the general practice of motor clubs to furnish their members with certain services of a legal nature in connection with their "memberships" or contracts.[1] Since 1931 a number of cases have arisen in which it has been charged that the automobile clubs in rendering these services are engaged in the unauthorized practice of law.[2] In all of the cases which have been brought to the courts of last resort—except in one instance[3]—this charge has been sustained[4] against the motor clubs. Usually no emphasis has been placed upon any particular type of service rendered by the clubs, but the courts have simply found that the practices as a whole constituted unauthorized practice of law. On this account it has been deemed unnecessary to deal separately with the specific services rendered by each motor club in the discussion of the individual decisions. All of the clubs involved in these cases had been providing for defense of members in magistrate and police courts for minor charges under the motor vehicle laws, and some even handled more serious charges, such as manslaughter. Most of them also were prepared to give legal advice to their members on matters with reference to the use or ownership of their automobiles, and to defend property damage suits brought against members as a result of collisions. Some had provisions for defense of personal injury claims and for prosecution of civil claims, and at least one provided for prosecution of criminal charges on behalf of members in courts without regular prosecuting attorneys.[5]

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[1] Results of private investigation indicate that these practices are being continued, apparently without active disapproval on the part of the bar, in at least a few of the states whose courts have not considered the question.

[2] People *ex rel.* Chicago Bar Association v. Motorists' Association of Illinois, 354 Ill. 595, 188 N. E. 827 (1933); People *ex rel.* Chicago Bar Association v. Chicago Motor Club, 362 Ill. 50, 199 N. E. 1 (1935); *In re* Maclub of America, 3 N. E. (2d) 272 (Mass. 1936); *In re* Thibodeau, 3 N. E. (2d) 749 (Mass. 1936); State *ex rel.* Seawell v. Carolina Motor Club, 209 N. C. 624, 184 S. E. 540 (1936); Rhode Island Bar Association v. Automobile Service Association, 55 R. I. 122, 179 Atl. 139 (1935); Yeats v. Automobile Owners Association of Florida, BRAND, UNAUTHORIZED PRACTICE DECISIONS (1937) 326 (C. C. Fla. 1934); Schuur v. Detroit Automobile Club, *id.* at 698 (C. C. Mich. 1937); Goodman v. Motorists' Alliance, 29 Ohio N. P. (N. S.) 31 (C. P. 1931); Dworken v. Cleveland Auto Club, 29 Ohio N. P. (N. S.) 607 (C. P. 1931).

[3] *In re* Thibodeau, *supra* note 2.

[4] Several cases have arisen also in the lower courts of Ohio (Goodman v. Motorists' Alliance, and Dworken v. Cleveland Auto Club, both *supra* note 2), and one in a Florida lower court (Yeats v. Automobile Owners Association of Florida, *supra* note 2), in all of which injunctions were granted against incorporated motor clubs which were furnishing legal services.

[5] State *ex rel.* Seawell v. Carolina Motor Club, *supra* note 2.

In only one case[6] has there been any indication that a motor club has performed legal services through other than duly licensed attorneys. In most of the other cases, the courts have said that these clubs could not perform legal services themselves because not licensed to practice law, and that they could not be permitted to accomplish indirectly, through the hiring of attorneys, what they could not legally do directly. The clubs' activity in this regard has been characterized by some courts as the buying and selling of legal services. The underlying objection seems to be that the intervention of a lay intermediary, whom the attorney regards as the source of both his employment and remuneration, destroys the relation of trust and confidence between attorney and client which has traditionally been regarded as necessary.[7] A practical objection is that these clubs, in effect, solicit business for the attorneys associated with them and employ commercial methods which attorneys in private practice are not permitted to use.[8]

On behalf of the motor clubs it has been urged that most of the cases handled by them are small cases which would never be taken care of if the individual were forced to bear the entire burden of the litigation on his own shoulders, and that a plan whereby those with common interests join together for mutual protection and assertion of their rights is the only practical method of seeing justice done in this situation.[9] Another theory of defense which the clubs have advanced is that taking the individual's case is merely incidental to the fulfilling of the purpose of the club to protect and foster the interests of motorists as a whole.[10]

While some of the cases have been decided under statutes forbidding corporate practice of law,[11] it has been found unimportant that the club was a voluntary association and not a corporation in one case,[12] and no significance was attached to the fact that the association involved in another case[13] was really a business conducted by an individual attorney even though the court there decided in favor of the club and was seeking to distinguish other cases. Hence, it is probable that the form of organization which the club takes is not a determining factor, although the existence of the corporate form makes available to the courts the well-established principle that a corporation cannot practice law.[14]

[6] *Ibid.* Lay members of the club had written letters on club stationery, demanding payment of damages for injuries claimed to have been caused by the negligent operation of the automobile by the other party involved, and follow-up letters were sent out by the club—the lower court found as a fact that the defendants by this practice were expressing and giving an opinion, at least indirectly, by adopting or confirming the opinion of the club member as to negligence as a matter of law on the part of the claimee, and as to the proper amount of damages involved in a case of tort liability. The court did not so indicate but it is probable that its finding was with reference to the follow-up letters only.

[7] *In re* Co-operative Law Co., 198 N. Y. 479, 92 N. E. 15 (1910). Comment (1937) 10 So. CALIF. L. REV. 329.

[8] AM. BAR ASS'N, CANONS OF PROFESSIONAL ETHICS (1937), Canon 27, p. 16.

[9] Comment (1934) 2 U. OF CHI. L. REV. 119.

[10] People *ex rel.* Chicago Bar Association v. Chicago Motor Club, State *ex rel.* Seawell v. Carolina Motor Club, Schuur v. Detroit Automobile Club, all *supra* note 2.

[11] People *ex rel.* Chicago Bar Association v. Motorists' Association of Illinois, *In re* Maclub of America, State *ex rel.* Seawell v. Carolina Motor Club, all *supra* note 2.

[12] Rhode Island Bar Association v. Automobile Service Association, *supra* note 2.

[13] *In re* Thibodeau, *supra* note 2.

[14] Notes (1931) 73 A. L. R. 1327, (1936) 105 A. L. R. 1364.

The highest court of Illinois has handed down two decisions within recent years, in both of which incorporated motor clubs were found in contempt and fined for performing legal services for members. In *People v. Motorists' Association of Illinois,*[15] the association had urged that it was a non-profit corporation and therefore within the section of the Illinois statute[16] which exempted corporations organized not for pecuniary profit from the operation of the statute enacted to prohibit corporations from practicing law.[17] By way of an answer to this contention, the court pointed out that the same section which provided for the exemption also stated that no corporation should be permitted to render any services which could not lawfully be rendered by a person not admitted to practice law in the state, nor to solicit directly or indirectly professional employment for a lawyer.[18] The court also relied upon its holding in a previous case[19] that a corporation could not be licensed by the legislature to practice law and that this rule applied to corporations organized not for profit.[20]

In *People ex rel. Chicago Bar Ass'n v. Chicago Motor Club,*[21] the same court stated that it was unable to condone the advertisements and solicitation of members by the club and the latter's admission that it was only acting as agent in rendering legal services for its members without abandoning precedents established in recent cases dealing with unauthorized practice. Again, the fact that the club was a corporation organized not for profit was not permitted to vary the rule that a corporation could neither practice law nor hire lawyers to carry on the business of practicing law for it. The court felt that public welfare demanded that legal services should not be commercialized and that "no corporation, association, or partnership of laymen can contract with its members to supply them with legal services, as if that service were a commodity which could be advertised, bought, sold, and delivered." It is interesting to note one contention advanced by the club as a part of its defense, namely, that its legal department had been approved by the Chicago Bar Association and excepted from the operation of its canons of ethics of 1928, but that an amendment in 1931 withdrew the sanction although the charter of the club and the extent of its activities remained the same. No reference was made to this ground of defense in the opinion.

The contention of the voluntary association in *Rhode Island Bar Association v. Automobile Service Association*[22] that it had not violated a Rhode Island statute forbidding a person not admitted to practice from advertising or holding himself out as an attorney in certain ways[23] was met by the court's finding that the act did not define for all purposes the practice of the law and further that if it had done so it would not impair or restrict the power of the Supreme Court over the practice of

[15] *Supra* note 2.

[16] ILL. REV. STAT. (Smith-Hurd, 1933) c. 32, §415.

[17] *Id.* §411.

[18] This provision would seem to render the exemption of no practical effect as applied to corporations organized not for pecuniary profit.

[19] People *ex rel.* Courtney v. Association of Real Estate Taxpayers, 354 Ill. 102, 187 N. E. 823 (1933).

[20] It has been urged that a distinction should be made between pecuniary corporations which go into the law business on the one hand, and the banding together of individuals in voluntary, non-pecuniary associations to provide for themselves certain legal services on the other. See Comment, *supra* note 9.

[21] *Supra* note 2.

[22] *Supra* note 2.

[23] R. I. Gen. Laws (1923) c. 401, §44.

law.[24] Adopting a broad view of practice of law, the court found that the acts performed by the association through counsel designated by it constituted such practice, and that the association with a duly licensed member of the bar would not absolve the members of the association from responsibility. The court stated that the respondents could not be allowed to do indirectly what they could not legally do directly, and thus evade the requirements of high standards for attorneys which the court had ordained as prerequisite to admission to the bar in order that the people might be assured the best possible service in the dispatch of their legal business.

The Supreme Court of North Carolina in *State ex rel. Seawell v. Carolina Motor Club*[25] granted injunctions against two corporations, the American Automobile Association and its affiliate, the Carolina Motor Club, on the grounds that the acts and methods of business of the defendants constituted violations of the North Carolina statute prohibiting the practice of law by any corporation, person, or association except licensed attorneys.[26] The court sustained the right of the legislature, within constitutional limits, to prescribe the qualifications and establish the rules and regulations under which citizens may enter the practice of law. Because the right to practice law was regarded as a personal right of an individual, it was found that a corporation could not lawfully practice law and was therefore forbidden also from accomplishing the same thing indirectly by employing lawyers to practice for it. The club had been engaged in collecting claims for damages for members in addition to rendering legal services in connection with the defense of members in cases of motor code violations, and this was likewise condemned.[27]

Massachusetts is the only jurisdiction in which there have been cases affording an opportunity to draw the line between what will be permitted and what will not be permitted in the field of legal services on the part of automobile clubs. Massachusetts has a statute which forbids corporations practicing law for other than themselves or holding themselves out as being entitled to practice law or give legal advice in matters not relating to their lawful business.[28] In the case of *In re Maclub of America*,[29] a decree was entered against the respondent, a corporation, on the grounds that many of the contractual duties entailed in the "memberships" could be performed only by members of the bar in the practice of their profession, and that, after the intervention of this lay intermediary, the feeling of obligation on the part of attorneys would run not toward the individual members but toward the club which furnished the consideration, thus destroying the confidential and fiduciary relation of attorney and client. It was noted that the contract was one to furnish legal defense and not one to pay for legal defense undertaken by members. The court called attention to the fact that the commercial methods of advertising employed were contrary to standards required of members of the bar, and that the publication of a list of recommended

[24] See also *In re* Opinion of the Justices, 289 Mass. 607, 194 N. E. 313 (1935).

[25] *Supra* note 2.

[26] N. C. CODE (Michie, 1935) §199 (a).

[27] *Supra* note 6.

[28] Mass. Acts 1935, c. 346, §1. For the attitude of the Massachusetts Courts on the question of the inability of the legislature to permit practice of law by corporations, see *In re* Opinion of the Justices, *supra* note 24.

[29] *Supra* note 2.

attorneys was in substance a representation that the club dealt wholesale in legal services.

The respondent in the case of *In re Thibodeau*,[30] also a Massachusetts case, was a practicing attorney, a member of a Boston law firm, who operated the "Automobile Legal Association" as a sideline. Although this so-called association offered much the same services as the Maclub and employed commercial methods of advertising in order to solicit members, the court distinguished the two cases and held that there was no illegal practice of law in this instance. It is significant that neither this association nor the Maclub would institute proceedings on behalf of members. Provision was made only for defense of charges of automobile law violations, defense in civil suits, and advice. The Automobile Legal Association further restricted its liability in the case of civil suits to the defense of property damage suits and had no provision for defending personal injury suits. In a summary of benefits appearing in its magazine, the association had expressly stated that members were not obliged to call upon the listed attorneys, but might call on any attorney of their own choice. In the latter event there was a stipulation as to the extent for which the association would be liable for specific types of legal services rendered.[31] Members were urged in this prospectus to communicate directly with attorneys in order that the confidential relation of attorney and client might exist from the start.[32]

The court, in distinguishing the *Thibodeau* case from the *Maclub* case which it had decided previously, stated that the Maclub was bound by contract to furnish legal defense, that it sold legal services, that it had control over the attorneys who did the work, and that members were its agents in employing attorneys; while the Automobile Legal Association performed none of the legal services and did not employ the lawyers who did the work or intervene in any way to direct or control them, but simply paid the bills presented by these lawyers. These distinctions seem at best tenuous in the light of the finding by the court below in the *Maclub* case that members were at liberty to employ attorneys other than those listed (although urged to employ those on the list), and that when an attorney was retained by a member the Maclub knew nothing of it until the bill for services was presented by the attorney for the member, and did not take any part in the management of the case. Perhaps the distinctions between the two cases indicate a conflict between the desire to preserve the attorney-client relationship from commercialization, and the recognition that the individual will, in many small cases, be deprived of the benefits of legal services if he is forced to rely solely on his own resources.

The arrrangement illustrated by *In re Thibodeau* would seem to approach a contract of insurance, which has been defined as any contract by which one of the parties

[30] *Supra* note 2.

[31] Liability limited to $10 for advice, $25 for defense for traffic violations, $35 for defense in reckless driving cases, $50 for defense of property damage suits, and $200 for defense of manslaughter charges—it did not appear that there were any limits fixed where listed attorneys were employed.

[32] In discussing the propriety of an attorney engaging in such an enterprise the court stated that, while advertising such as was disclosed here would be grossly improper if for the lawyer himself, yet a member of the bar is free to engage in commercial pursuits of an honorable character and to advertise his purely mercantile business honestly and fairly by ordinary commercial methods.

for a valuable consideration, known as a premium, assumes a risk of loss or liability that rests upon the other, pursuant to a plan for the distribution of such risk.[33] A Kentucky case[34] has held that a contract for defense of criminal and civil suits and prosecution of civil suits growing out of the use of an automobile is a contract of insurance. The court said that it could not distinguish the case from one where the contractee was paid and he in turn paid the attorney engaged to represent him. In Minnesota, the Supreme Court has found[35] that an agreement to defend a contract holder against civil or criminal litigation resulting from the use of his automobile is insurance on the grounds that rendition of services was as much compensation for loss from a stated event as would be the payment of money under a Minnesota statute defining insurance.[36] In neither of these cases was the issue presented as to the validity of the contract from the viewpoint of unauthorized practice of law as both involved the question whether the corporations had to comply with the state insurance laws.[37]

In only one case,[38] decided in a Michigan Circuit Court, has a motor club received recognition of a right to engage in furnishing legal services, through its own legal department, to its members. While the decision was placed largely on the construction of Michigan statutes, the result was reached in the face of a provision that no corporation should be permitted to render any service which cannot lawfully be rendered by a person not admitted to practice law in the state nor to solicit directly or indirectly professional employment for a lawyer.[39] This statute provided that a corporation or voluntary association should not be prohibited from employing an attorney or attorneys in and about its own immediate affairs. The technique of the decision was to find that although the activities of the non-profit corporation constituted practice of law, the interest taken in the individual member's case was but incidental, and that the cases were undertaken for the ultimate bringing into fruition of the larger purposes of the organization—in other words the club was the real party in interest. The court said that such practices had so entered into the warp and woof of the complex business and professional life as to have ripened into a practical rule of construction as to what legal services might be permitted by one not an attorney.

[33] VANCE, INSURANCE (1930), p. 57. At page 60, the same author states that an attorney who, for a fixed annual retainer, agrees to care for such legal business as may arise in connection with his client's activities, does not make a contract of insurance. Compare State *ex rel.* Physicians' Defense Co. v. Laylin, 73 Ohio St. 90, 76 N. E. 567 (1905) and Vredenburgh v. Physicians' Defense Co., 126 Ill. App. 509 (1906) (holding contracts for defense of physicians from malpractice suits not to be insurance), with Physicians' Defense Co. v. Cooper, 199 Fed. 576 (C. C. A. 9th, 1912) and Physicians' Defense Co. v. O'Brien, 100 Minn. 490, 111 N. W. 396 (1907) (holding the same type of contract to be insurance). See Comment, *supra* note 7.

[34] Allin v. Motorist's Alliance, 234 Ky. 714, 29 S. W. (2d) 19 (1930).

[35] State v. Bean, 193 Minn. 113, 258 N. W. 18 (1934).

[36] MINN. STAT. (Mason, 1927) §3314.

[37] A contention that the insurance company has a substantial interest in the suit such as would entitle it to conduct the defense would probably not be valid, since the obligation is merely to pay the attorneys' fees and is in no way dependent on the ultimate outcome of the suit.

[38] Schuur v. Detroit Automobile Club, *supra* note 2.

[39] MICH. COMP. LAWS (1929) c. 197, §10175. This statute is substantially the same as the one in Illinois, *supra* note 16.

In one of its early opinions,[40] the Committee on Professional Ethics and Grievances of the American Bar Association disapproved the furnishing of legal services by an automobile club to its members, irrespective of the method of retaining lawyers or whether the club was operated for profit. Canon 35 of the American Bar Association's Canons of Professional Ethics[41] expressly provides that a lawyer may accept employment from a organization such as a club or trade association to render legal services in any matter in which the organization as an entity is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.[42] Charitable societies rendering aid to the indigent are not deemed intermediaries by the terms of this canon.

The problem presented with reference to automobile clubs has also arisen in connection with medical defense plans and various protective associations. The courts have usually refused to recognize a right on the part of such associations to furnish members with legal services.[43]

So far as the automobile club is concerned, it is doubtful whether much comfort can be taken from the Michigan case, as the argument that the association was merely handling individual cases as part of the fulfillment of its own purposes has been advanced in some of the other cases to no avail.[44] However, the doctrine of the *Thibodeau* case may offer a means whereby the motor clubs can spread the costs of minor litigation in connection with automobiles over their entire memberships by agreeing to pay the fees of attorneys to be selected and dealt with by the members individually. There has been statutory authorization of a similar arrangement. In the 1935 Rhode Island act prohibiting unauthorized practice of law, it was expressly provided that the act should not forbid "Any automobile club or association from paying or agreeing to pay for the services of attorney [*sic*] to advise and defend its members, providing such attorney is of the member's own selection and is not to be subject to the control of said club or association."[45] It is possible that such a plan would necessitate the organization of insurance companies, in the light of the Kentucky and Minnesota decisions heretofore considered.

[40] Opinions 8 (1925), AM. BAR ASS'N, OPINIONS OF COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES (1936) p. 53.

[41] AM. BAR ASS'N, *op. cit. supra* note 8, p. 20.

[42] See Opinion 56 (1931) (employment by grange association) and Opinion 98 (1933) (employment by state bankers' association to advise member banks, AM. BAR ASS'N, *op. cit. supra* note 40, at 130 and 194.

[43] People *ex rel.* Lawyers' Institute of San Diego v. Merchants' Protective Corp., 189 Cal. 531, 209 Pac. 363 (1922); People *ex rel.* Los Angeles Bar Association v. California Protective Corp., 76 Cal. App. 354, 244 Pac. 1089 (1926); People *ex rel.* Courtney v. Association of Real Estate Tax-Payers, 354 Ill. 102, 187 N. E. 823 (1933); State *ex rel.* Physicians' Defense Co. v. Laylin, *supra* note 33 (defense of physicians from malpractice suits); Dworken v. Apartment House Owners Association, 38 Ohio App. 265, 176 N. E. 577 (1931); see also (1937) UNAUTH. PRAC. NEWS 52 (Report of hearing before Am. Bar. Ass'n committees on Unauthorized Practice and Professional Ethics at which the plan of the Ohio State Medical Association for legal defense of doctors was held to constitute unauthorized practice of law).

[44] People *ex rel.* Chicago Bar Association v. Chicago Motor Club, State *ex rel.* Seawell v. Carolina Motor Club, both *supra* note 2.

[45] R. I. Acts 1935, c. 2190, §46, Clause B, ¶8. (No case has arisen in Rhode Island under this section).

COLLECTION AGENCY ACTIVITIES: THE PROBLEM FROM THE STANDPOINT OF THE AGENCIES

E. H. LOTHIAN*

Some definitions are in order at the outset. What is the problem? Briefly, it may be stated as the determination of what functions of a collection agency are proper and do not constitute unauthorized practice of the law. What is a "collection agency"? Perhaps it can be defined simply as an individual, a company, or an organization that is engaged in the business of adjusting accounts for creditors. It is necessary, however, to outline the functions of a collection agency in order to see what the problem is. There are many kinds of collection agencies, some reputable and honest and well financed—some quite the reverse. We shall attempt to describe the actual operation of a reputable collection agency as it is or ought to be. It will be necessary also to explain some of the weaknesses and actual acts of commission which deserve correction.

In the course of this discussion, it would not be fair to refrain from mentioning some reasons for the existence of collection agencies. Nor would it be right to fail to mention some functions of collection agencies that grew out of a demand and that have not been performed well by others. Neither would it be proper to omit some references to the position of the lawyer and his ethical viewpoint. In any approach to this subject, moreover, the reader should know that the reputable lawyers of the nation have for years wished to protect the profession and the public from evils growing out of "unauthorized practice of the law." The activities of lawyers have grown more intense in recent years. New laws have been introduced in state legislatures. Injunction suits have been filed. Bar association committees have passed rules and regulations and have had hearings and conferences. Many states have adopted the plan of the "integrated bar," which has implemented such activities. The operations of trust companies, automobile associations, insurance companies, collection agencies and many other organizations have been under review. Collection agencies have not been singled out for attack, but have been merely among the organizations attacked.

Some of the things that collection agencies do that are permitted by statute or court decisions in some states are attacked in other states. Some of the ordinary functions performed generally by nearly all collection agencies are admitted to have been improper. Some other things are not considered wrong by either the creditor or the agency but have been considered so by certain lawyers and have been construed so by some courts. Courts have made little distinction between reputable agencies and

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those which are not reputable. There is much difference of opinion about exactly what constitutes unlawful or unauthorized practice of the law. There is much hazy and poorly-directed thinking among agencies, creditors, lawyers and courts. Prejudice, self-interest, incomplete information and cupidity have had their places in the controversies.

To outline the regular service performed by the ordinary reputable collection agency for its employers, let us take a typical credit transaction and follow it through to a conclusion. The illustration is simply to describe the usual steps in an average wholesale collection and it is not to be considered in the light of any special state statutes or supreme court decisions, although it must be understood that in actual practice there are special conditions that now apply in certain states of the nation, by virtue either of statutes or judicial rulings.

The creditor sells merchandise or performs a service for someone else on credit and thus a debt is created. If the debt is not adjusted according to terms the creditor proceeds to try to secure settlement and if he has difficulty he may decide to employ a collection agency. Collection agencies have various terms for service but the charges are generally contingent upon collection, and in the ordinary wholesale collection they have been approximately 15% although special terms either higher or lower than this may be offered by the agency or arranged by it. We shall use this 15% as a convenient and the customary figure.

The creditor usually sends to the agency a simple statement of his account with the debtor. The agency attempts by personal contact or other "lay" means to secure settlement. We use the term "lay" as distinguished from "legal" efforts. In some cases the creditor desires to preserve harmonious relations with his customer. Often it is only necessary for a third party to make the request for payment, whereupon the debtor settles promptly. In other cases the creditor is primarily interested in securing his money and is ready for drastic action, if it is necessary. If the agency obtains settlement by its own efforts it usually remits the proceeds to the creditor after deducting the agreed service charge and the transaction is closed.

The agency, however, may not be able to obtain collection by "lay" effort and may believe that the item should be sent to a lawyer. It informs the creditor of the situation and obtains instructions to place the claim with an attorney. By the custom of many decades, such a claim placed with an attorney has been placed with him by the agency acting as agent for the creditor and the piece of business has been offered to him on the basis of two-thirds of the 15% fee contingent upon collection. The agency normally retained the other one-third of the 15% to reimburse it for work done in its previous efforts plus correspondence, reporting, follow-up, and other services. If the attorney was able to secure payment without filing a suit he remitted to the agency, less the two-thirds of the 15%. The agency remitted to the creditor, less its one-third of the 15%, and the transaction was closed.

If the lawyer found that legal proceedings were necessary he notified the creditor or the agency and usually requested that court costs or suit fees or both be advanced to him. The creditor usually advanced these to the agency, and the latter, in turn,

sent the money to the lawyer. The well-conducted, reputable agency did not attempt to secure any share of such fees. Its compensation came from the one-third of the original collection commission agreed upon. If court costs were recovered they were returned to the creditor intact.

It has been the custom of the agency to select the lawyer from a "law list" and to send him the item of business under the protective bond which is one of the purposes of law lists. The efficient law list company also undertakes to see to it that the lawyers on its list render prompt and efficient service. If a lawyer is careless or dilatory or fails to account for funds collected, the law list company undertakes to get redress for the creditor. Thus, the creditor has been able to send a claim to an agency and expect the item to be serviced to a conclusion. He could close his file, relieve his mind of worry and forget the details. The majority of collection items have been serviced by "lay" service to a conclusion even if, in some cases, a lawyer aided in the work.

Those who choose collection work as their means of earning a living, quite naturally, and nearly always, enjoy the work. Many become unusually proficient. Many develop astonishing ingenuity and resourcefulness. They learn the necessary facts about industrial and economic conditions in various markets. They learn by experience the efficiency of those to whom they "forward" collection items, whether other agencies or attorneys. They become acquainted with the conditions surrounding the chronic debtor. They learn how to help debtors to find the means of payment. Frequently they may arrange a complete reorganization of a debtor's business or methods. Thus they can work in the public interest. They know what papers are necessary when their customer wants legal action taken and are of great help in assembling and securing them for the attorney.

Of course, in the conduct of a business that may have 10,000 or more organizations engaged in it, and that handles several hundred million dollars of accounts receivable in a year, evils can creep in and actually have crept in. Here are some practices that can not be defended; the reputable agency does not engage in:

(a) Splitting legal fees with lawyers.
(b) Using forms or papers that simulate court documents.
(c) Giving legal advice.
(d) Filing suits in courts of record on behalf of others.
(e) Threatening legal proceedings.
(f) Soliciting claims at the instigation of an attorney.

There are other practices that have been used by some agencies to the discredit of all who are engaged in the collection business.

Until September 1937, Canon 34 of the American Bar Association permitted the sharing of a collection commission with a lawyer. The section authorizing such procedure was repealed at the Bar Association's national convention in Kansas City and now reads "No division of fees for legal services is proper except with another lawyer based upon a division of service or responsibility." Some think that this makes it unethical for a lawyer to receive a collection item from a lay agency, when the agency

participates in the division of the collection commission. They maintain that the collection commission is a legal fee.

The reputable collection agency maintains stoutly that the collection commission is not a legal fee. Unfortunately neither lawyers nor courts have been in agreement on this question. The more enlightened lawyers who have made an extensive study, however, believe that a collection agency of the reputable class can perform a useful service and they do not consider the collection service charge a legal fee. If the agency does some work with reference to a claim and gets one-third of the collection commission, and the lawyer does certain work and gets two-thirds of the collection commission—these facts do not have anything to do with such things as court costs, suit fees, retainers, or other legal fees.

Out of the arguments, suits and controversies, have come a better understanding of the whole problem and the elimination of many abuses. These are some of the things the lawyers wish to see done. They want the creditor to be free to have direct relations with his attorney, if he cares to. The creditor should be free to select his lawyer. The creditor should be told what was paid to the lawyer and what to the agency. If the agency suggests the lawyer's name, it should offer a choice where possible. The lawyers want the agencies to make changes in the wording of their forms to show the above things very clearly. Reputable collection agencies do not object to these things. They are perhaps more anxious than anyone else to let the creditors know the steps in an ordinary collection. It is to the interest of all concerned to have creditors know who the attorneys are—what they do and what they charge for doing it.

Many court decisions of state supreme courts have attempted to point the way to proper and harmonious relations. In some cases, however, these decisions have not seemed to take into account the ordinary and practical relationships between creditor, debtor, creditors' agent and attorney.

How can collection agencies operate in such a way that their useful functions can be continued and also in a manner that will be acceptable to lawyers? One way adopted by certain agencies is somewhat as follows. First, the agency has prohibited the acceptance of any share of any suit fee or legal fee. It has ceased to use any type of advertisement that tends to intimate that it is competent or holding itself out as giving legal advice. When a claim seems to be ready for any legal action it advises the creditor of the whole situation and secures the creditor's instructions. If the creditor wants to have a suit started and if the creditor wants the agency to perform work toward this end, the agency gives to the creditor one or more names of lawyers who have proved their competence in handling such matters. The creditor then selects a lawyer and instructs the agency to proceed with the details. This procedure satisfies the lawyer that the selection of himself is the work of the creditor and the fact that the agency informs him that he may deal directly with the creditor at any stage of the proceedings gives him the direct relationship privilege that is his inherent right.

Hardly any lawyer who is reasonable could object if a creditor selects him but wishes to appoint some one else (the agency) to handle the details, carry on the correspondence, and help in the securing of necessary proofs of a claim. In our own

opinion, the fact that some lawyers have objected is a reflection upon their knowledge of the practical help the agency can and does perform. The fact that some agencies have gone farther than their function necessitated, may, of course, have something to do with the attitude of certain lawyers.

After all, when an agency has done a great deal of work, has made many personal contacts with a debtor, has spent a considerable amount of time and money on a claim, it is reasonable that the work it has done should have in it much that can be helpful in the final stages of a difficult collection. Agencies do help lawyers very materially. Why shouldn't they? They are like the lawyer in that their compensation for work done is dependent on collection of the account. If they do not collect they do not receive compensation. Some are organized for service to members without much regard to compensation.

Many lawyers have told the writer that they prefer to have experienced collection men in the picture in order to get from the creditor the help needed in handling a claim through one or more courts. It is to be remembered that many credit executives are not familiar with all the steps in enforcing a collection. They are proverbially critical of the (to them) excessive costs involved, and are inexperienced in the mechanics of collection. The intelligent explanations of experienced collection men have done very much to make a creditor sympathetic to the problem of the lawyer.

Of course, when the time comes for legal action, the claim could be returned to the creditor and he could fend for himself from that time forward. But many of the benefits of preliminary work of the agency would be lost. The agency's intimate knowledge of the situation would be wasted. The creditor would not ordinarily be able by experience to know to which lawyer to send the business. Neither, very frequently, would the creditor's own local lawyer. It seems proper to repeat that the collection business is a highly specialized business and that it is no field for amateurs, whether they be lawyers or laymen. Under some of the conditions mentioned herein, it is obvious that the agency can be of inestimable help to both creditor and lawyer, being in a position, by experience, at least to suggest the names of competent lawyers for the creditor's selection.

Some have not known what can be and what is being done by reputable agencies or organizations to insure the proper performance of their offices. We shall confine ourselves to what is done in one very large cooperative organization with some 65 affiliated collection offices. In the first place the affiliated organizations wish to render service to members but are under the necessity of at least paying the expenses of such service. This objective is important but is less important than high class, legitimate, ethical, helpful and constructive performance.

Accordingly certain standards of operation are maintained for the protection of everyone. By that we mean that the final objective includes the purpose of seeing to it that any creditor anywhere may receive good service, honestly performed, at a minimum cost. This is the purpose of all legitimate and reputable collection agencies, whether they be individually or cooperatively owned, whether they operate as a single office or as a large company with branches.

Individuals handling money are adequately bonded and such bonds are inspected and approved by those competent to know. Business and financial operations are studied and supervised by trained management, and by a Board of Directors or, in the case of cooperative organizations, a Committee of Control composed of actual users. Accounts and records are audited by certified public accountants and, often, by "inside" or "supervisory" accountants also. Trust funds are separated from operating funds. Files and interior office conditions are studied as to actual performance and policies. Prompt remittances and scrupulous accounting for all trust funds are the rule in any well conducted agency. All these activities are, of course, in addition to the ordinary mechanics of the handling of the very intimate relationship of creditor and debtor, which have been mentioned heretofore.

There are very many reputable agencies operating in this manner, and it is hardly necessary to point out that if all agencies did likewise, there would be no trouble. It is, we believe, fair to say also that in the actual practice of law by members of the profession, ethical standards have been violated and the policing job has been difficult. We are convinced that the American Bar Association and the reputable collection agencies are both engaged in a sincere attempt to eliminate unethical and dangerous practices.

The actual existence of collection agencies for so many years should indicate to everyone that they grew out of a need and that they have had the acceptance of the business public. Such a facility does not spring up—full grown—overnight. We have tried to show that it is a specialized business and it is hardly necessary to reiterate that natural aptitude and years of experience are requisites of successful collection men.

The remuneration for collection work is not great. We can say without fear of contradiction that lawyers generally do not enter the profession just to become collection experts. The writer of this article has not met many lawyers who do not prefer other types of work to collection business. It is the personal history of the lawyers of the writer's acquaintance that they prefer to "graduate" from collection work, whenever they are able to do so.

Someone has rightfully said that "evils tend to correct themselves." So it is at this juncture in the collection business. Thoughtful individuals, looking at the "problem" as a whole, have not failed to visualize the ideal condition. We conceive it to be the condition where both collection agencies and lawyers have their places in the business field, complementing the work of each other without conflict, prejudice, fanaticism, misunderstanding or avarice. It is as inevitable that the collection man learn much about law as it is that the lawyer will learn some of the ramifications of collection work. But, in spite of the breadth of knowledge of the law which may be acquired by any individual, no reputable collection agency representative wants to practice law. He is happy to leave this part of a collection transaction to those who are licensed to take care of it in courts of record.

Casual observers will readily admit that much remains to be done on both sides. Conferences and exchanges of views, without rancor or bitterness, continue, as always, to solve such problems.

COLLECTION AGENCY ACTIVITIES: THE PROBLEM FROM THE STANDPOINT OF THE BAR

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The genesis of the movement against unauthorized practice of the law by the organized bar in the United States was the report of a special committee of the New York County Lawyers Association, of which Julius Henry Cohen, Esq., was chairman, which resulted in the appointment of the first standing committee on unlawful practice of the law in the United States by that Association in 1914. In the reports and in the discussions leading up to the organization of that committee, among the activities of laymen in the field of law practice which were deemed a menace to the public and to the bar alike, and which were the subject of great discussion, were those of the collection agencies.

At about the same time, the Committee on Ethics of the New York County Lawyers Association, of which Charles A. Boston, Esq., was chairman, in its answer to Question 47, condemned many activities then current affecting the relations of lawyers to collection agencies.

There are now functioning in the United States approximately four hundred twenty-nine committees on unauthorized practice of the law in addition to the national committee of the American Bar Association. Throughout the years, since the subject of unauthorized practice of law was first actively discussed, there is hardly any report on the general subject that has been made which did not refer to the activities of collection agencies and there has been a country-wide battle over legislation to regulate, and litigation to prevent and punish, unauthorized practice of law by collection agencies.

By penal law and decisions, by canons of ethics, and by the crystallization of public opinion, certain principles, the upholding and enforcement of which vitally affect the public interest, have become generally accepted. These principles might be summarized as condemning the champertous stirring up of law suits and legal proceedings for profit, the purchase and sale of legal claims against others for the purpose of suit thereon, the advertising and solicitation of legal business by laymen for lawyers or by lawyers through laymen, either in tort or contract cases, and any

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form of association, partnership or relationship between laymen and lawyers involving the division of fees and tending to increase litigation and encouraging the practice of law by laymen.

The necessity for the upholding of these principles in the interests of the public, the administration of justice and of the bar, are so self-evident that one sometimes wonders why the public and bar alike have been blind so long to their violation in the collection agency field and have been, until recently, so ineffective in dealing with the problems arising from such infractions.

A collection agency has been defined in Black's Law Dictionary as a concern which collects all kinds of claims for others and a collector is defined as "a person appointed by a private person to collect the credits due him."

Within the terms of this definition, the collection agency can, and in many instances does, perform a useful function. In fact, whenever the activities of collection agencies generally are attacked in court or in a legislature, it is claimed by the representatives of the collection agency business that they do function only within the general terms of this definition.

The same dictionary defines a lawyer as a person licensed to practice law who, for fee or reward, prosecutes or defends cases in the courts, or whose business it is "to give legal advice in relation to any case or matter whatever."

Unfortunately, in actual practice, the activities of neither collection agencies nor lawyers were kept within these definitions. Lawyers affiliated with collecton agencies thought that by becoming "collectors" they might divest themselves of the necessity of compliance with the ethics and standards of conduct required of a lawyer. Meanwhile, collection agencies assumed to give legal advice and to conduct their business along lines which in fact amounted to practicing law, resulting in numerous abuses.

In considering the general problem as long ago as 1913, Charles A. Boston, Esq., said, with reference to the collection business:

> "It is not inherently legal business; there is no substantial reason why others may not legitimately engage in it; but if a lawyer is selected to attend to it, it is because of his professional standing and in prosecuting it, it is part of his professional duty to conduct himself in it with the same degree of integrity and in the observance of the same ethical principles which would characterize the performance of his strictly professional duties."[1]

And so, as a practical matter, the basic cause of the problem arises from the fact that when a business man gives a claim for collection to a lawyer, he has all of the protection that the professional relationship implies in connection with that matter, but by the same token, the lawyer is restricted by the canons of ethics and the standards of the profession from certain activities in connection therewith which might result in the collection of the claim. For example, the lawyer cannot adopt outrageous dunning methods amounting to blackmail; he may not make threats to destroy the credit of the debtor, or to communicate with debtor's other creditors or the trade generally that the debtor is unreliable, nor may he go out and solicit and

[1] American Legal News, August, 1913.

corral other claims against the debtor as a weapon to enforce the collection, or to precipitate a bankruptcy.

But, if the same claim is given to a collection agent, while the creditor has none of the protections of the professional relation, the very lack of restriction, ethical standards or inhibitions of any kind permits the collection agency to engage in methods which ofttimes bring about results. From the creditor's point of view, the debtor owes him money and any means used to collect the debt are justifiable.

In addition, collection agencies are free to advertise, solicit and tout for business. All of the methods of business solicitation forbidden to lawyers are employed. It is therefore readily understandable, why in the last thirty or forty years the commercial law practice has so largely come under the control and into the hands of lay collection agencies.

Self-evidently, when ordinary dunning methods fail, the claim transforms itself into a potential lawsuit. If anything further is to be done, a lawyer must appear upon the scene. By virtue of his office, he sometimes can collect the claim by demand on threat of suit, or by instituting suit in the court, or his services are required in a bankruptcy proceeding, which often ensues.

Now of course, no collection agency will say openly that it is entitled to practice law or to go into court, but it is face to face with the alternative of admitting its ineffectiveness to its customer, or proceeding to "furnish" the legal service which the customer would have received in the first instance, had he employed a lawyer. Thus, as a practical matter, the collection agency, so far as creditor and debtor are concerned, is practicing law, except that it does not appear in court, although there are instances of this as well, where careless courts tolerate such appearances.

Collection agencies have maintained that the "furnishing of a lawyer" does not constitute the practice of law, and they have argued that the very fact that they "furnish" a lawyer as *part* of their services is a denial of any representation on their part of practicing law. The business community has very generally accepted this argument of the collection agencies.

Through the years, creditors generally who dealt with collection agencies understood as a "business practice" that when they gave a collection item to the agency, it was appropriate and essential that the matter be attended to by that agency, through its lawyers right through including suit, trial, judgment and bankruptcy proceedings.

But making a business of furnishing the services of professional men, whether they be lawyers, doctors, dentists, optometrists, or others, is in fact the practice of that profession.[2] Therefore, laymen and corporations are specifically prohibited from furnishing lawyers and legal advice in penal statutes in New York and other states, and such "furnishing" is included in prohibited acts which constitute illegal practice

[2] Furnishing lawyers, *In re* Cooperative Law Co., 198 N. Y. 479, 92 N. E. 15 (1910); doctors, People v. Dermatological Institute, 192 N. Y. 454, 85 N. E. 697 (1908); dentists, *In re* Harlem Dental Co., 189 App. Div. 359, 178 N. Y. Supp. 533 (1919); optometrists, McMurdo v. Getter, Mass. Sup. Jud. Ct. (Sept. 20, 1937) 4 U. S. L. WEEK 142.

of law.[3] If the lawyer is the agent, servant or employee of the collection agencies or beholden to them in any way, the direct relationship of attorney and client is bound to be destroyed. Where the collection agency, by reason of being the intermediary or entrepreneur, is in control of the selection, compensation and action of the lawyer, in most jurisdictions, by statute or decision, it is held that the collection agency is in fact practicing law.[4]

Unfortunately most lawyers are satisfied with a sound theory, particularly when it affects the profession, and feel that the foregoing general statement of principles involved and their self-evident rightness ought to settle the problem. But in a realistic world unfortunately this is not so. Business men generally speaking demand what they call "service," and have been led to, and do, believe that collection agencies are cheaper and more efficiently organized to perform functions which a lawyer cannot or will not perform; and as a practical matter, they have made their own distinction between what they call "collection items" and "legal matters." As to the former, they do not see why they should deal with lawyers at all, and are indifferent to what collection agencies do when lawyers whom they supply are called in.

Unless and until this point of view of the business community changes, the reality of the situation is that the commercial law practice will continue, as it has in the past, largely under the control of collection agencies.

The volume of collection business in the United States from the great forwarding centers such as New York, Chicago, Philadelphia, Detroit and St. Louis, where large businesses engaged in interstate commerce have their main offices, runs into astoundingly large figures. The average lawyer in general practice is wholly unaware of what is involved; he is apt to think that the subject being discussed is a trivial one involving dunning methods in the collection of small claims, such as possibly local accounts due a department store or other retail concerns. But in truth, the problem under discussion affects the entire credit structure of the wholesale commerce of the United States, in one form or another. The customers of manufacturers and wholesalers are necessarily located all over the country, and when a debtor does not pay a collection agency upon a demand or through ordinary dunning methods, the claim has to be forwarded for action to wherever the debtor may be, and there a local lawyer must be employed.

This necessity brought about, concurrently with the growth of the collection agency business, the so-called "law list" business, the conduct of which is part of the problem.

These law lists contain the names of local lawyers in every city, town and hamlet of the United States, and, naturally, their revenue depends upon charging as much as they can get from these lawyers for their listing. The large volume of professional

[3] N. Y. PEN. LAW, §§270, 280.

[4] See particularly the reasoning and citations in State *ex rel.* McKittrick v. C. S. Dudley & Co., 102 S. W. (2d) 895 (Mo. 1937), *Cert. denied*, 58 Sup. Ct. 12 (1937). The cases involving collection agencies are listed in BRAND, UNAUTHORIZED PRACTICE DECISIONS (1937) beginning at page 767.

employment that is involved can best be realized when one considers that, during the past year, it has been estimated that lawyers whose names have appeared in these law lists have paid for such listing approximately $15,000,000.[5]

Completely accurate figures of all of the commercial law business that is forwarded over the lists cannot be obtained, but, as long ago as 1927, an investigation by the chairman of the Committee on Supplementary Canons of Ethics of the American Bar Association disclosed that during the preceding year one law list alone had handled $100,000,000. of forwarded claims, and that another had handled $40,000,000. and still another $10,000,000. There are approximately two hundred of these lists now being published in the United States.

These law lists, in one form or another, have adopted a system by which the cost to the lawyer of the publication of his name is based upon the volume of professional business he receives. The more business the lawyers receive, the higher the price for the listing. Various methods of computing the listing charge are adopted, but the objective is the same.

Hence, it became a matter of important business to the law list publishers to see to it that their lists were used. The more widely a law list was used the more profitable its business. One of the chief sources for the forwarding of commercial business was the collection agencies. Direct relationships between law lists and collection agencies in mutual aid of the solicitation, control and forwarding of commercial business were established.

Lawyers were charged for listing according to the population or size of their town and accurate track was kept of the amount of professional employment of each lawyer because the forwarder notified the list of each item of business sent, and the list, in return for this, guaranteed the fidelity of the lawyer.

Summing it all up, we have the situation where, because of the attitude of the business community above referred to, this extraordinarily large volume of professional business was directed, controlled and handled by laymen for profit, with the aid of lawyers, and this included not only simple collections, but also bankruptcies, insolvencies, lawsuits, trials and the entire field of commercial law.

In the development of the control of commercial business by collection agencies, competition among themselves has forced them to offer their services purely on a contingent basis, so that they are not paid by their customers if they do not obtain results. Necessarily, lawyers employed by them are required to undertake their professional services on the same general basis; certainly, their initial employment is thus secured, subject to special arrangements in matters of litigation. The contingent fee, however much the bar generally may condemn it, is in the collection field to stay.

In order that the business community could receive "service" from the collection agencies on a cheap enough basis to justify it, the compensation of lawyers engaged

[5] See *Suggestions in Opposition to 1937 Report of Special Committee on Law Lists*, filed with American Bar Association Convention by representatives of the State Bar of Oklahoma and the Missouri Bar Association, at page 4.

in this field was perforce based, not on the value of their professional services, and the work they did, but on the size and amount of the claim provided it was collected. Any lawyer who undertook to enter into this field on this contingent basis could hardly afford to do so unless a large volume of similar business were received by him through the same channels, and it followed naturally that this could only be done if commercial business of this character were concentrated in the hands of a few lawyers in each community. In this way, handling totally unremunerative matters on a contingent basis might be compensated by some remunerative cases if a sufficient volume of matters were obtained.

In the natural development of this business, solicited and given in the first instance to the collection agency, the direct relationship between lawyers involved and their real clients (the creditors) was obliterated. Lawyers could only justify receipt of further business from the forwarding collection agency by pleasing it—and more and more came to regard the forwarding agency as their employer.

By reason of the cheapness of the service required and the control over the lawyer's services by the lay intermediary, most members of the bar in the various localities preferred not to be listed or employed, and thus the practice of commercial law became a specialized activity of lawyers who, for one reason or another, were willing or compelled to accommodate themselves to the practical exigencies of the situation. In passing, it is to be noted that the younger lawyers of the United States could hardly afford the cost of listing their names in the law lists or to engage in this business on the contingent scale of fees required. Over the years, most of the fine younger members of the bar have been unable to apply their initial professional activities to a field of law practice which had been available to the generation before. In addition, strict compliance with the canons of ethics and standards of professional conduct imposed by the organized bar prohibited them from seeking to compete with the collection agencies in the field.

The state of commercial law practice had fallen so low indeed that it was generally taken for granted by the business community that lawyers, to whom collection items were to be sent, should be bonded as a matter of course, and practically every law list advertised that it furnished a bonding or fidelity guarantee insuring the honesty of receiving lawyers. This was directly contrary to the action of the organized bar as expressed in its canons of ethics, that the high office of the lawyer, the oath that he has taken, his required character and attainments, and the essential dignity of the profession, all made unseemly a lawyer consenting to be bonded for his own honesty. Yet, in the commercial law field, unless the lawyer agreed to do so, he would not be listed.

Many collection agencies maintained and conducted a credit reporting system. It is hard to say which activity first emerged. The business community thus received a valuable service which lawyers could not undertake, to wit, a credit report in advance as to the financial standing of a prospective customer, or a report as to the condition of an existing customer. In the latter instance, if the report indicated lack

of safety, the claim, if past due, was naturally forwarded for collection to the agency furnishing such report.

As a business-getting inducement in aid of the soliciting of collection business, many agencies offered what was called a "free demand" service so that any customer, using their credit reports, would be entitled, free of charge, to the use of some preliminary dunning letters or demands in the name of the agency. The fact that so much of this free demand service was given indicates rather eloquently that the more lucrative part of the collection agency business, in many instances, was not derived from the mere "dunning" of delinquent accounts. Of course, lawyers could not, with propriety, compete along these lines, even if it were economically possible.

The demands that were sent out were form letters and their effectiveness depended necessarily very much on the language used, which, in the case of the reputable collection agencies, was couched in appropriate language. But, of course, in the keen competition for business, unprincipled and generally "fly-by-night" collection agencies used forms in which were contained threats, extortionate demands and papers simulating legal documents or court process for the purpose of intimidating the debtors.

It is but fair to say that the extraordinary language and methods used in connection with dunning, which became a public scandal and have been prohibited in most states by law, were not originally conceived by the more reputable collection agencies. But, as the entire collection of accounts by dunning methods was considered outside of the field of law practice, the methods employed were wholly without restriction and control until the legislatures stepped in.

It was inevitable and natural that the diversion of the commercial law practice of the United States in the manner described would create a situation menacing to the public interest, interfering with the proper administration of justice, and utterly destructive of the canons of ethics and standards of professional conduct. The business of collecting accounts is highly competitive. Competition among collection agencies and law lists became increasingly keen and in many instances unscrupulous. Utilizing high pressure business methods to secure claims and to collect them in competition with one another seemed to require that the viewpoint of the legal profession be ignored. And why not, when the securing of a claim for collection did not necessarily mean that a lawyer would be required; at least, that is what creditors were told and believed, and if this were so, of course, it was cheaper. Thus, the inception of business depended upon the belief that lay collection agencies could collect accounts more efficiently than lawyers and more cheaply. The employment of a lawyer in such matters became not only something to be avoided, but collection agencies, in the solicitation of business, ofttimes represented that "their lawyers" if employed, would not increase the cost to the client. And it became a matter of business necessity for lawyers who served collection agencies to adjust their charges for professional services accordingly.

And so the collection business by lay agencies grew lustily into an important

business, utterly free from any ethical restrictions such as existed for the protection of the public in the general field of law practice.

As competition between the laymen grew ever keener in this wholly unrestricted activity, gross abuses developed. From all parts of the United States came complaints of unjust intimidation of debtors by harassing suits, blackmailing methods, simulation of legal process, precipitation of unnecessary bankruptcies, control of insolvent estates in aid of secret preferences, and for the purpose of obtaining a share of legal fees to the utter disregard of creditors' interests, and appearances in courts by lawyers acting for intermediaries who did not know their own clients. The encouragement of "commercial ambulance-chasing" through collection agencies by unprincipled lawyers affiliated with them was one of the demoralizing by-products.

While the business community would have been quick to condemn laymen who made it a business to chase ambulances in order to obtain accident cases for lawyers, the same thing in the field of commercial law seemingly was tolerated as being quite in line with ordinary business methods. The disregard and pollution of legal ethics resulted inevitably in producing a scandalous state of affairs.

In the bankruptcy courts, investigations disclosed that the alliances between collection agencies and lawyers were largely responsible for conditions which brought about the heaviest losses to the creditors. To quote from the *Donovan Report:*

"Working arrangements were effected between attorneys and collection agencies, the agencies being remunerated for furnishing information concerning insolvent debtors. Fees were split with certain employees in the clerk's office for advance information of the filing of voluntary petitions. Petitions were filed by the attorneys as 'attorneys in fact' for creditors who had not authorized, and had no knowledge of, the use of their names. Creditors were bribed into permitting the use of their names on petitions by arranging for them to obtain merchandise in the bankruptcy proceedings on fictitious claims. The attorney for the petitioning creditors would pay a percentage of his fees as attorney for the receiver and trustee to the bankrupt's attorney or the collection agency that had been instrumental in obtaining the case for him. . . . In general, creditors have taken but little interest in the administration of bankruptcy estates. Elections of trustees have been controlled by proxies solicited by attorneys, collection agencies and trade associations who, in most cases, have had no interest in the proceedings other than to control the election."[6]

A system such as this involves far greater evils and abuses than mere "unlawful practice of law." Lack of restriction, supervision and immunity from discipline of laymen unlawfully practicing law leads always to offenses of a far graver nature. Methods of enrichment which may be used in the pursuit of a business cannot be adopted for a profession when such methods flout its ethics and proprieties. When they are adopted, demoralization follows.

In a recent report to the Appellate Division of the New York Supreme Court, First Judicial Department, in connection with ambulance chasing, the statement is

[6] In the Matter of an Inquiry into the Administration of Bankrupts' Estates, (U. S. Dist. Ct., S. D. N. Y. 1930), Report by William J. Donovan, Esq., pp. 4 and 5. See also *Report of New York Board of Trade Committee on Bankruptcy,* dated January 31, 1934.

made that the "ever-present handmaidens of ambulance chasing" are the graver crimes of perjury, subornation of perjury and larceny.[7] There can be no distinction in principle between ambulance-chasing in accident cases and activities of the same kind in the field of commercial law.[8]

As the movement against "unlawful practice of the law" crystallized and became national in scope, the organized bar, most of the leaders of which knew little, if anything, of these conditions in the commercial field, found themselves facing therein a *fait accompli*. Commercial law practice was controlled and in the hands of lay agencies, law lists and a rather helpless commercial bar. Not only this, but the scandals in the administration of justice in the commercial law field were ascribed by the public to the bar, and the responsibility therefor seemed to rest upon the bar. Practices had developed which cast a stigma upon the entire profession. Many of the lawyers involved were entirely dependent upon the collection agencies and law lists, as intermediaries, to send them professional employment. But, the good name of the entire bar was at stake.

Something had to be done. The organized bar swung into action. Statutes were passed in many states restricting the activities of collection agencies in one form or another, proceedings by injunction and contempt were successfully conducted by the bar associations, disbarment proceedings against lawyers were brought. In some states, the rather ineffective remedy of licensing and specifically regulating collection agencies has been tried. In some of the United States District Courts, local rules have been enacted, seeking to control the voting of solicited claims in bankruptcy.[9]

In some states, a definite drive is on to "drive the collection agencies out of business." At nearly every bar association meeting, the younger lawyers vigorously espouse a campaign with this objective. But neither from a public nor a professional point of view can the problem be solved so cavalierly. A system that has grown up over a period of half a century can neither be legislated nor litigated out of existence. Particularly is this true where, as here, the business community sincerely desires some of the legitimate service which reputable collection agencies can give.

In New York and elsewhere, whenever the bar has sought legislation to "drive the collection agencies out of business," the agencies have been supported by thousands of business men who, without question, honestly believed such legislation inimical to their interests.

The movement by the bar associations to stop unauthorized practice of law in the collection agency field has been generally misunderstood and misrepresented, as being an attempt by the lawyers to get back some legal business for themselves. Neither the business community nor the collection agencies realize that this self-evidently is not so. Lawyers are essentially a part of any system collecting accounts

[7] *Accident Fraud Investigation*, Report by Bernard Botein, Assistant District Attorney, New York County (1937) p. 3.

[8] See Canons 28 and 35, AM. BAR ASS'N, CANONS OF PROFESSIONAL ETHICS (1937).

[9] Rule 8-A, S. D. N. Y.; rule 39, E. D. N. Y.

when dunning methods fail, and collection agencies were utilizing the services of lawyers to a large degree. What made the organized bar aghast was the way in which the business was being conducted and the relations of lawyers and laymen therein. If lawyers were to be permitted in the commercial law field utterly to disregard and violate the legal ethics and standards of professional conduct which applied to every other branch of the profession, then the struggle of the organized bar to uphold these standards was bound to be a losing one. Teaching ethics to young lawyers as part of their preparatory course became a useless gesture, if these rules applied to some branches of law and not to others.

Historically, the movement against unlawful practice emerged from a desire to enforce the ethics of the profession. The very first Committee on Unlawful Practice of the New York County Lawyers Association was an off-shoot of the Committee on Ethics of that Association; in the American Bar Association, the parent of its present Committee on Unauthorized Practice is its Committee on Professional Ethics and Grievances.

The desire of lawyers to uphold the ethics of their profession is based not upon self-aggrandizement, but rests upon the conviction that the continued usefulness of the profession as an instrument of public service must depend upon the maintenance and upholding of a correct professional attitude toward the public, toward their clients, and toward the courts. Lawyers generally regard this as self-evident. But the business men do not grasp this situation. The question, from their point of view, is a very simple one: if all the lawyers were honest and lived up to the standards of the profession, there would be no abuses—the legal profession "should clean house." If they want to give a claim to a collection agency, they do so because they do not think they need a lawyer at all. So why interfere with collection agencies? And anyway, what right has the bar to insist upon the direct relationship of lawyer and client, if the client prefers it otherwise?

And yet, here in this field of commercial law, we face the extraordinary difficulty of reconciling a relationship between laymen and lawyers which has its inception in a simple situation, not necessarily involving a lawyer, yet generally resulting in law practice, and the furnishing of lawyers.

During the past two years, substantial progress has been made toward a solution of the problem. The American Bar Association's Committee on Unauthorized Practice of the Law, as well as the New York State Bar Association's Special Committee on Collection Agencies, adopted a declaration of principles as follows:

"It is improper for a collection agency:

1. To furnish legal advice or to perform legal services, or to represent that it is competent to do so; or to institute judicial proceedings on behalf of other persons.
2. To communicate with debtors in the name of an attorney or upon the stationery of an attorney; or to prepare any forms of instrument which only attorneys are authorized to prepare.
3. To solicit and receive assignments of claims for the purpose of suit thereon.

4. In dealing with debtors to employ instruments simulating forms of judicial process, or forms of notice pertaining to judicial proceedings, or to threaten the commencement of such proceedings.
5. To solicit claims for the purpose of having any legal action or court proceedings instituted thereon, or to solicit claims for any purpose at the instigation of any attorney.
6. To assume authority on behalf of creditors to employ or terminate the services of an attorney or to arrange the terms or compensation for such services.
7. To intervene between creditor and attorney in any manner which would control or exploit the services of the attorney or which would direct those services in the interest of the agency.
8. To demand or obtain in any manner a share of the proper compensation for services performed by an attorney in collecting a claim, irrespective of whether or not the agency may have previously attempted collection thereof."[10]

This declaration of principles has been adopted by the New York State Association of Collection Agencies[11] and also by the Commercial Law League of America,[12] and steps are being taken by these latter organizations to see to it that their members live up to these principles in the conduct of their business relations.

Furthermore, the American Bar Association has now assumed jurisdiction over the law list problem by the establishment of a standing committee with full jurisdiction to approve such lists as conduct their business by the adoption of standards of conduct approved by the Association, and the Canons of Professional Ethics have been amended so that they now prohibit any attorney from permitting his name to be listed in any but an approved law list.[13]

In order that lawyers engaged in commercial law practice shall understand that their relations with collection agencies and others are subject to the same restrictions as apply to every other branch of practice, a new canon has been adopted providing that no lawyer shall permit his professional services or his name to be used in aid of or to make possible the unauthorized practice of law by any lay agency, personal or corporate,[14] and Canon 34 has been amended by deleting an exception heretofore contained therein which had the effect of tolerating a division between lawyer and layman of commissions on collection items forwarded to the lawyer by the layman. Canon 34 now absolutely forbids splitting of fees between lawyer and layman.

However, these various measures, though admirable in themselves, are only the first steps remedying a long neglected situation. The bar must continue vigilantly and effectively to uphold the standards of professional conduct, and to prosecute all lawyers who violate them in the commercial field. Reputable collection agencies who are now cooperating in the enforcement of the principles, and who are seeking to place the conduct of their business in its properly circumscribed field upon an ethical plane should be aided and encouraged to police their own industry. The

[10] Adopted by American Bar Association Committee, May 4, 1937; New York State Bar Association Special Committee on Collection Agencies, July 26, 1937.
[11] On October 5, 1937.
[12] On August 16, 1937.
[13] Canon 43, as amended in 1937.
[14] Canon 47 (adopted 1937).

courts should be made more aware of the conditions described in this article, and should use the power vested in them by statutes and common law to regulate the practice of law by lawyers and the unauthorized practice by laymen who assume to practice, either inside or outside the court room. This will aid both the bar and the reputable collection agencies in preventing the abuses which have been described. In many states, the courts have this power inherent in themselves.[15] In New York recently, the Supreme Court was granted jurisdiction, not only over lawyers, which it had previously, but also over "all persons assuming to practice law," and unauthorized practice of law was made a contempt of court.[16]

The American public will support vigorously the movement to cleanse the Augean stable of commercial law practice when once it understands our true purposes and objectives. But, the ultimate solution of the problems discussed will depend on obtaining the thorough-going cooperation of the great commercial community of the United States, and how this can be secured involves the public relations of the bar, a subject which cannot be discussed within the limitations of this article.

[15] Massachusetts, Illinois, Minnesota, Virginia, Ohio, Missouri, Kansas, Vermont, Louisiana, and Rhode Island.

[16] N. Y. Laws 1937, c. 311.

COLLECTION AGENCIES AND THE COURTS

THOMAS E. BUTTERFIELD, JR.*

The past few years have witnessed a concerted drive in the courts by the legal profession against certain activities of collection agencies. Numerous actions have been instituted by bar associations or by individual lawyers to restrain the unauthorized practice of law by the agencies, or to terminate the existence of corporate agencies because of such unauthorized practice. The "lay" collection agency is by its very nature precluded from the practice of law, an activity reserved to the members of the legal profession. The form of the agency, whether individual or corporate, appears to bear little weight in the decisions. Practice by the corporate agency is merely subject to the additional sanction of the rule that "a corporation cannot practice law."[1] Under neither form has any agency even contended that it was entitled to practice law.[2] If, however, the agency is maintained by a lawyer or by a legal firm, it is not vulnerable to such attack, for it is clear that a lawyer may specialize in collecting claims whether or not suit is necessary thereon,[3] and may forward claims to another lawyer for collection. In conducting such work, the lawyer is subject only to the usual professional standards governing the attorney in the practice of law. It is for this reason that the great majority of the cases deal with the activities of lay agencies.

The point upon which most of the cases turn is whether or not the questioned activity of the lay agency constitutes the practice of the law. Of great importance in any consideration of the cases is an inquiry into the plan of operations under which the agency conducts its collection business. For a close analysis of the procedure employed by the agency is characteristic of all the decisions in this field.

Chronologically the first phase of the agency's activities in the collection of claims

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[1] People *ex rel.* Los Angeles Bar Ass'n v. California Protective Corp., 76 Cal. App. 354, 244 Pac. 1089 (1926); Midland Credit Adj. Co. v. Donnelley, 219 Ill. App. 271 (1920); *In re* Co-Operative Law Co., 198 N. Y. 479, 92 N. E. 15 (1910).

[2] Two decisions have gone so far as to permit agencies to act themselves as "attorneys" in justice of the peace courts. Representing a minority view, these decisions are based upon special statutes, and upon the judicial holding that a justice of the peace court is not technically a court. United Securities Corp. v. Pantex Pressing Mach., 98 Colo. 79, 53 P. (2d) 653 (1935); Rehm v. Cumberland Coal Co., 169 Md. 365, 181 Atl. 724 (1935). *Contra:* Depew v. Wichita Ass'n of Credit Men, 142 Kan. 403, 49 P. (2d) 1041 (1935), *cert. denied,* 297 U. S. 710 (1936); State *ex rel.* Freebourn v. Merchants' Credit Service, 66 P. (2d) 337 (Mont. 1937); State *ex rel.* Dist. Atty. v. Lytton, 110 S. W. (2d) 313 (Tenn. 1937).

[3] *In re* Swihart, 42 S. D. 628, 177 N. W. 364 (1920).

solicited by it is the dunning of the debtor. Ordinary dunning may take the form of personal contact or of written communications. The effectiveness of these forms is dependent upon persuasion or intimidation of the debtor. The latter method has frequently run afoul of the law. By some agencies debtors are intimidated by the use of fearsome legal-looking documents, "prepared with generous use of large black type, large red type, and glaring underscoring of legal phrases, with very conspicuous seals attached."[4] Various instruments are addressed to the debtors—denominated variously as "final notice," "garnishee demand and supplementary notice," "notice to employer," etc. The law is held up as a bogey for the oppression of debtors. Such simulation of judicial process has been generally condemned as unlawful practice of the law,[5] and is frowned upon by reputable agencies. The use of such instruments by attorneys for purposes of collection has been also condemned as unprofessional.[6] A few courts have held the mere threat by an agency to bring suit against the debtor if he does not pay, to be a usurpation of the function of the lawyer.[7] Influential, however, in one of these decisions was the fact that the agency used a letterhead reading "attorneys all over Canada and United States." It is possible also, though not apparent, that, in two of the cases, the manner of the threat, as well as the mere threat itself, may have lent weight to the decisions. It is to be doubted that the courts will apply stringently the rule that a threat by an agency to institute suit constitutes practice of the law. One case points out that the separation of legitimate from unlawful dunning methods may be an exceedingly difficult factual question.[8] It is difficult, for example, to say with certainty how much red ink or how many seals are permissible in the ordinary dunning letter without transgressing the rule forbidding simulation of legal process. Mere dunning is not practice of the law,[9] but it appears from the decisions that an agency must be very chary in its use of threats to institute suit against the debtor.

Where its dunning methods are unobjectionable, an agency engaging in the mere solicitation and collection of claims has generally been free from attack. For the courts hold quite generally that solicitation and collection of claims "without resort to the courts" is a legitimate pursuit and does not constitute practice of the law.[10]

[4] State Bar v. Retail Credit Ass'n, 170 Okla. 246, 248, 37 P. (2d) 954, 956 (1934).

[5] Berk v. State, 225 Ala. 324, 142 So. 832 (1932), 84 A. L. R. 740 (1933); State *ex rel.* Freebourn v. Merchants' Credit Service, *supra* note 2; State Bar v. Retail Credit Ass'n, *supra* note 4. See cases collected in BRAND, UNAUTHORIZED PRACTICE DECISIONS (1937) at 794.

[6] *In re* Davis, 168 Minn. 6, 209 N. W. 627 (1926); *In re* Swihart, *supra* note 3.

[7] Harman v. Associated Retail Credit Men, BRAND, *op. cit. supra* note 2, at 416 (Sup. Ct., D. C. 1935) (The court here approved an agreement by the agency "that it will not attempt to make collection of any such account by means of threats of legal action or threats that it will place such account with any attorney at law either directly or indirectly."); State *ex rel.* McKittrick v. C. S. Dudley & Co., 102 S. W. (2d) 895 (Mo. 1937); Goodman v. Provident Credit Co., BRAND, *op. cit. supra* at 426 (Ct. of Common Pleas, Ohio 1935); Le Barreau de Quebec v. Merchants' Credit Adj. Bureau, Rap. Jud. Quebec 66 C. S. 235 (1927).

[8] *In re* Sandborg, BRAND, *op. cit. supra* note 2, at 602 (Dist. Ct., Minn. 1930) ("Apparently this respondent tried to get as close to the line as was supposed to be safe; I think it was crossed.")

[9] Washington St. Bar Ass'n v. Knapp, BRAND, *op. cit. supra* note 2 at 451 (Super. Ct., Wash. 1935).

[10] Neander v. Tillman, 232 App. Div. 189, 249 N. Y. Supp. 559 (1931); State *ex rel.* McKittrick v. C. S. Dudley & Co., *supra* note 7; Public Service Traffic Bureau v. Haworth Marble Co., 40 Ohio App.

There is, however, some recent support for the view that neither a layman nor a corporation may engage in any phase of the collection business. Statutes in Alabama[11] and in Rhode Island[12] apparently include the business of collecting claims by demand or negotiation out of court in the definition of practice of law, thereby making the conduct of such business by a layman or corporation unlawful. To the same effect are some orders issued by the Supreme Judicial Court of Massachusetts at the instance of the attorney general, restraining generally the conduct of a collection agency business by laymen.[13] The bulk of the cases involve activities of the agencies somewhere between these two extremes.

The decisions are all comparatively recent and illustrate in most instances a gradual curtailment of the activities of the collection agencies. For very practical reasons the agencies have been unwilling to restrain their activities to the mere collection of claims by ordinary dunning methods. It is argued that the most lucrative operation of the collection business entails offering the public a complete service.[14] To gain customers an agency must be able to tell the business man that for a certain percentage of the recovery the agency will collect all of his claims which are collectible. It would be an unattractive proposition to the merchant for the agency to say that the claims which it could not collect without suit would be returned to the creditor, even though only a small charge were made. Compensation of the agency is almost necessarily contingent. To make no charge for all claims on which suit was necessary would be unprofitable. The creditor might still decide that he might better have gone to a lawyer in the first place. Thus it is obvious that there is a strong incentive for the agency to retain some control of all claims till final recovery, whether collected with or without suit.

Probably the first collection business restrained was that conducted by a corpora-

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225, 178 N. E. 703 (1931); State v. James Sanford Agency, 167 Tenn. 339, 69 S. W. (2d) 895 (1934). But see Meisel & Co. v. National Jewelers' Bd. of Trade, 90 Misc. 19, 28, 152 N. Y. Supp. 913, 919 (1915).

[11] ALA. CODE (Michie, Supp. 1932) §6248—"Only such persons as are regularly licensed have authority to practice law. For the purposes of this section, the practice of law is defined as follows: Whoever . . . (d) As a vocation, enforces, secures, settles, adjusts, or compromises defaulted, controverted or disputed accounts, claims or demands between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense; is practicing law." In Berk v. State, *supra* note 5, this act was declared constitutional and was held to apply to a collection agency which contracted to turn claims over to its lawyer when it deemed suit necessary thereon, and which collected the attorney's fee from the debtor. See Kendrick v. State, 218 Ala. 277, 120 So. 142 (1928). *Contra:* TEX. GEN. LAWS (1933) c. 238, §2. Subdivision (e) of this act is identical with (d) in the Alabama act, *supra*, but is qualified as follows: "provided that subdivision (e) hereof shall not prohibit any individual, company, corporation or association, owning, operating, managing, or controlling any collecting agency . . . from . . . collecting, securing, settling, adjusting or compromising, out of court, defaulted, controverted, or disputed accounts, or claims growing out of contractual relations. . . ."

[12] R. I. Pub. Laws 1935 c. 2190, §45 is substantially the same as subdivision (d) of the Alabama act, *supra* note 11. It excludes, however, from its operation non-profit-sharing credit corporations or associations engaged in the collecting and adjusting as incidental to their main purposes, contract claims of their own members; "provided, however, that if the aid of any court is to be invoked on such a claim, the same shall be turned back to the creditor-member for reference to his own attorney at law." Held constitutional in Creditors' Service Corp. v. Cummings, 190 Atl. 2 (R. I. 1937).

[13] (1935) 1 UNAUTH. PRAC. NEWS, No. 12, p. 6.

[14] Dudley, *The Collection Agency and the Public Interest* (1935) 40 COM. L. J. 274.

tion composed of lawyers, whose members brought suit on claims solicited by the corporation.[15] This corporation was dissolved by an early application of the rule that a corporation cannot practice law. A similar set-up found a lay agency maintaining its own law department through which it performed the services of an attorney when suit was necessary on solicited claims. Such an agency has been held to be undertaking the practice of law, whether the law department be maintained on a salary or on a commission basis.[16] The Illinois court expresses its difficulty in seeing how the agency could maintain such a department "without practicing law". The same result was reached where a partnership carried on a collection business.[17] Claims were solicited by the lay members of the firm and suits were brought thereon by the attorney member. To the court this scheme savored too much of champerty and maintenance. The agreement for a split of the fees between the legal and the lay members of the firm was held void as against public policy. Also void as against public policy was an arrangement between an agency and an attorney whereby routine collections were to be handled by the agency and collections requiring suit were to be handled by the attorney.[18] This was described as an elusive attempt by the agency "to practice law under the disguise of its attorney associate." Such schemes as these have never been in widespread use by the reputable collection agencies.

Various other business practices generally followed by the agencies have also been held illegal. Under one widespread plan of operation, the agency solicits claims from creditors under an agreement whereby the agency is to collect the claim. The agency retains a certain percentage of the recovery if the claim is collected without suit, and an increased percentage if suit is necessary. The ordinary claim is collected by the agency without resort to the courts. If suit appears necessary, the agency selects to handle the matter an attorney who receives as compensation for his services the major percentage of the agency's commission, plus a suit fee if suit is actually brought. This scheme has generally been held to constitute practice of the law wherever brought to the attention of the courts.[19] In *In re Ripley*[20] the collection agency agreed to "enforce, secure, settle, adjust and compromise" claims of its clients. This was condemned as a contract to furnish legal services. The injunction in *Depew v. Wichita Ass'n of Credit Men*[21] restrained specifically only the splitting of fees between the agency and the attorneys retained by it to prosecute its clients' claims. In view of the fact that such practice was then apparently permitted under Canon 34 of

[15] *In re* Co-Operative Law Co., *supra* note 1.

[16] Creditors Nat'l Clearing House v. Bannwart, 227 Mass. 579, 116 N. E. 886 (1917); State *ex rel.* v. Retail Credit Men's Ass'n, 163 Tenn. 450, 53 S. W. (2d) 918 (1931).

[17] Waychoff v. Waychoff, 309 Pa. 300, 163 Atl. 670 (1932).

[18] Midland Credit Adj. Co. v. Donnelley, *supra* note 1. Hicks and Katz, *Practice of Law* (1931) 41 YALE L. J. 69, 88.

[19] Depew v. Wichita Ass'n of Credit Men, *supra* note 2; *In re* Shoe Mfgrs. Protective Ass'n, 3 N. E. (2d) 746 (Mass. 1936); *In re* Ripley, 191 Atl. 918 (Vt. 1937).

[20] *Supra* note 19.

[21] *Supra* note 19.

the American Bar Association Canons of Ethics,[22] the court placed reliance on Canon 35 proscribing dealings with intermediaries. In a Massachusetts case,[23] the court singled out as unauthorized practice the fact that the agency determined whether or not legal proceedings should be instituted and exercised its full discretion as to settlements and compromises of claims. Basic in the decision of these cases was the fact that the lawyer employed by the collection agency to prosecute claims solicited by the agency was the agent not of the creditor but of the agency. All correspondence passed through the hands of the agency and in many cases the "client" never knew who his attorney was. The recovery was always forwarded to the creditor by the agency. Such intervention by the agency has been condemned on the ground that it destroys the confidential and fiduciary relationship which should exist between attorney and client. A dictum in one case intimated that it might be permissible for the agency to engage a lawyer for the creditor, provided the creditor actually became a client of the lawyer.[24]

Several recent cases illustrated attempts by the agencies to come within the scope of the above dictum. In a Virginia case[25] the agency specified in all its correspondence that it was merely the agent of the creditor to select the attorney and that the direct relation of attorney and client was created between the attorney who handled the suit and the creditor. The court, in holding the agency engaged in unauthorized practice of the law, looked beyond the technical relation of attorney and client created by the contract of the parties to the practical control exerted by the agency. It was found that the agency "selects the lawyer, employs him, fixes his compensation and shares therein, prescribes the term of his employment, and controls and directs his actions, even to the point of discharging him if it sees fit." The same procedure was used by the agency in a Missouri case,[26] with two additional modifications: 1. The agency requested its creditor-clients, when it became necessary to place the claims in the hands of an attorney, to select attorneys of their own choice. It was found, however, that under this arrangement the creditors did not avail themselves of the privilege and that the agency selected "nearly all the attorneys to whom claims were sent for collection." 2. The attorney's compensation was fixed at a certain percentage of the recovery, rather than upon the basis of the agency's commission. Here too the court enjoined the continued conduct of such business by the agency, finding that in fact the attorney was the agent of the collection agency and not of the creditor. The court's conclusions are of great significance:

[22] This canon was amended in 1937, and as now worded does not permit fee splitting of any sort between attorney and layman. *Contra:* 18 PA. STAT. ANN (Purdon, 1930) §2507 ". . . but the established custom of sharing commissions at a commonly accepted rate upon collection of claims between a collection agency and an attorney or attorneys at law is not prohibited hereby."

[23] *In re* Shoe Mfgrs. Protective Ass'n, *supra* note 19.

[24] State *ex rel.* v. Retail Credit Men's Ass'n, 163 Tenn. 450, 464, 43 S. W. (2d) 918, 922 (1931) ". . . the defendant is free to engage for the retail merchants and others about the collection of their claims as many attorneys as these customers authorize. The lawyer, however, must be engaged to represent the merchant whose claim is turned over. The merchant must become a client of the lawyer."

[25] Richmond Ass'n of Credit Men v. Bar Ass'n, 189 S. E. 153 (Va. 1937).

[26] State *ex rel.* McKittrick v. C. S. Dudley & Co., *supra* note 7.

"We therefore conclude that the respondent has the right to collect debts for others provided it does not employ an attorney or promise to employ one, or threaten the debtor with suit if he does not pay. If collections cannot be made without the services of an attorney, the respondent should return the claim to the creditor who should be free to select and employ his own attorney. The respondent should not engage directly or indirectly, in the business of employing an attorney for others to collect claims or to prosecute suits therefor, nor have any interest in the fee earned by the attorney for his work."[27]

In one Tennessee case only has the court upheld the terms of the parties' contract giving the agency the right to engage an attorney, as agent for the creditor.[28] The court held that the collection agency by contract with its clients might upon their direction select and employ an attorney to represent the client in any court proceeding found necessary to collect the claim, and might fix the attorney's compensation. "Employment of a lawyer by the agent in behalf of the patron would create the relation of attorney and client, as between the patron and the lawyer. . . . Control of the claim would be transferred to the lawyer." The meager facts in this case do not give us the details of the procedure used by the agency. It is clear however that the agency is enabled by this decision to give a form of complete collection service to its clients, which would appear to be precluded by the Virginia and Missouri cases.

As yet unpassed upon by the courts is a procedure under which the agency limits its contract with creditors to an engagement to collect claims by permissible dunning methods. If such methods fail of collection, the agency will send to the creditor the names of several lawyers, from which the creditor may select one lawyer to prosecute his claim. The creditor offers to engage the attorney, an offer which is communicated to the attorney by the agency. If the attorney accepts the offer, he has made a contract with the creditor, and not with the agency, which from this point on is out of the picture. The work of the agency has saved the creditor some trouble in the selection of an attorney, and still the agency has not employed the attorney itself. The legality of such a plan of operations would not appear to be precluded even under the Missouri decision.

The agencies have also resorted to other means of rendering the public a complete collection service. A formally perfect device is available in the assignment method. The agency secures claims for collection in the usual manner and, if it appears that suit is necessary to collect the claim, the agency takes an assignment thereof from the creditor. As legal title holder the agency then brings suit on the claim in its own name. From the ultimate recovery the agency deducts a substantial percentage, out of which it pays court costs and attorneys' fees and takes its own commission. The balance is returned to the creditor. This practice has been upheld in California[29] and in Washington.[30] The California court held the agency was not engaged in the practice of law, relying upon a statute which recognized the right of collection

[27] *Id.* at 902.
[28] State *ex rel.* Dist. Atty. v. Lytton, *supra* note 10.
[29] Cohn v. Thompson, 128 Cal. App. (Supp.) 783, 16 P. (2d) 364 (1932).
[30] Washington St. Bar Ass'n v. Merchants' Co., 183 Wash. 611, 49 P. (2d) 26 (1935).

agencies to do business, including "obtaining in any manner the payment of a claim";[31] and upon the absoluteness of the assignment upon its face. The court felt that the practice had been "so long recognized . . . both by statute and decision" that it could not be against public policy. The Washington court relied on statutes permitting suit by the assignee of a chose in action[32] (that the assignment was for collection was held to make no difference under the statute), and recognizing the right of a collection agency to do business.[33] Four other courts, however, have reached the opposite result. A Virginia collection agent sued *in propria persona* on a claim assigned to him by a client. On motion of the defendant and upon the authority of a Virginia statute,[34] the court dismissed the complaint.[35] An Illinois court held that the agency was engaged in the practice of law, regarding the assignment as a "fraud and a sham and merely subterfuge to enable . . . [the agency] to commence the suit in its own name."[36] A Tennessee court, taking the same view, holds that, although if taken singly the assignment contracts might be unobjectionable, nevertheless when they constituted a customary practice they were to be condemned as a device to evade the laws relating to practicing law.[37] A Montana court has recently reached the same result on the ground that the agency as assignee for collection was not the real party in interest.[38] Hence, as the agency brought the suits in a representative capacity, it was engaged in the practice of law. These decisions illustrate the courts' unwillingness to sanction any device which will enable the agency to control the suit on claims solicited by it for collection. The same result has been reached by statute.[39] The New York statute has been applied to a subsidiary corporation which took assignments of notes from its parent corporation for the purpose of bringing suit thereon, even though there was no solicitation by the subsidiary.[40]

As a natural concomitant of their ordinary claim work the agencies have occasion to file claims in bankruptcy. In connection with this subject also, the question of unauthorized practice has arisen. The state courts have condemned the practice whereby the agency filed claims and forwarded them to attorneys of its own selection.[41] The Virginia and New York State courts took jurisdiction over the objection that the activities complained of were connected solely with practice in the federal

[31] CAL. GEN. LAWS (Deering, 1931) Act 1460.

[32] WASH. REV. STATS. (Remington, 1932) §191. [33] *Id.* at §5847-4.

[34] Va. Acts §1924, c. 415 providing in effect that no person, firm or corporation shall assign to another any claim, or any interest therein for the purpose of having such assignee represent the claim in court.

[35] Bryce v. Gillespie, 160 Va. 137, 168 S. E. 653 (1933).

[36] People v. Securities Discount Corp., 279 Ill. App. 70 (1935), *aff'd*, 361 Ill. 551, 198 N. E. 681 (1935).

[37] State v. James Sanford Agency, *supra* note 10.

[38] State *ex rel.* Freebourn v. Merchants' Credit Service, *supra* note 2.

[39] N. Y. Penal Laws, §280, as amended by Laws 1934, c. 534, §3; 18 PA. STAT. ANN. (Purdon, 1930) §2504 "It shall be unlawful for a collection agency, for the purposes of collecting or enforcing the payment thereof, directly or indirectly, to buy, take an assignment of, or to become in any manner interested in the buying or taking of an assignment of, any such claim."

[40] Bennett *ex rel.* New York County Lawyers' Ass'n v. Supreme Enf. Corp., 250 App. Div. 265, 293 N. Y. Supp. 870 (1937), *aff'd*, 11 N. E. (2d) 315 (N. Y. 1937).

[41] Depew v. Wichita Ass'n of Credit Men, *supra* note 2; Meisel & Co. v. National Jewelers' Bd. of Trade, *supra* note 10 (agency solicited appointment of self as trustee in bankruptcy); Richmond Ass'n of Credit Men v. Bar Ass'n, *supra* note 25.

courts, on the ground, *inter alia,* that the activities of the domestic corporate agency were subject to supervision by its state of incorporation. In the same field drawing up of assignments for the benefit of creditors by the agencies has been condemned.[42] The federal courts are split upon the question, which has not as yet been passed upon by the Supreme Court, except inferentially in the denial of *certiorari* in the *Depew* case. Three district court decisions tend to the attitude of the state courts set forth above, holding: (1) That a layman cannot represent more than one creditor in a bankruptcy proceeding;[43] (2) That the participation in the election of a trustee by a collection agency is the practice of law;[44] (3) That a trustee in bankruptcy elected by votes cast under powers of attorney held by himself, and obtained by soliciting creditors, should be removed.[45] The circuit court of appeals of the second circuit, however, has upheld the solicitation of claims for collection, and the vote by the collection agent, as representative of the creditors, for himself as trustee.[46] One district court, tempering its definition of practice of law by what it considers to be a practical consideration of the effect of the agency's work in the administration of bankrupt estates, has recently held that the agency might lawfully solicit and file claims in bankruptcy, and solicit and use powers of attorney for the purpose of electing trustees in bankruptcy.[47] The court relied on its judicial knowledge that the intervention of a disinterested collection agency often expedited the administration of a bankrupt estate by arousing creditors from their customary apathy. The simplicity of the work under the Supreme Court rules of procedure and the close supervision thereof by the referees in bankruptcy were also influential factors in the decision. Contrast with this viewpoint, that taken by the court in *In re Scott*[48] which stresses the fact that the solicitation of claims in bankruptcy is a growing evil, resulting in ill-advised bankruptcies, expensive and unnecessary receiverships and trustees whose primary duties are neither to the court nor to the creditors as a whole.

The picture painted at the present time by the statutes and decisions relative to collection agencies is one of confusion. Save where it is barred completely, it is apparent that the agency occupies a different status in each of the states in which it has received legislative or judicial attention. In a number of states the agencies have been limited to the mere collection of claims, without resort to the courts, and without association with lawyers. Under such restrictions the agency certainly cannot offer the public a complete collection service, possibly cannot afford to stay in business maintaining the limited service in which it may legally engage.[49] In a number of

[42] Depew v. Wichita Ass'n of Credit Men, *supra* note 2; Clark v. Reardon, 104 S. W. (2d) 407 (Mo. App. 1937).

[43] *In re* Ploof Mach. Co., 243 Fed. 421 (S. D. Fla. 1916).

[44] *In re* Scott, 53 F. (2d) 89 (W. D. Mich. 1931).

[45] *In re* Dalsimer & Co., 56 F. (2d) 644 (S. D. N. Y. 1932).

[46] *In re* Mayflower Hat Co., 65 F. (2d) 330 (C. C. A. 2d, 1933).

[47] Rinderknecht v. Toledo Ass'n of Credit Men, 13 F. Supp. 555 (N. D. Ohio 1935).

[48] *Supra* note 44.

[49] Angstman, J., dissenting in State *ex rel.* Freebourn v. Merchants' Credit Service, 66 P. (2d) 337, 350 (Mont. 1937), says: "As I read the majority opinion, its effect is to put all collecting agencies in Montana out of business."

states the agency has been enabled to offer a fairly complete service, either on the basis of an assignment procedure, or by acting as the creditor's agent in the selection of an attorney. In many states the question has not as yet come before the courts. It is to be expected that the present campaign by bar associations against the practice of law by the agencies will result in the judicial or legislative settlement of the problem in most jurisdictions, but this process would be facilitated if the judicial opinions in the field were more illuminating as to the bases of decision.

The process of decision in most collection agency cases permits the liberal use of judicial discretion. In the absence of any hard and fast definition of "practice of law" the courts feel free to characterize any activity as constituting such practice without shedding much illumination on the question of why this is so. Typical of the generality of the opinions in this field is the following: "We . . . hold that the acts, transactions, and conduct of the defendants enumerated and contained in findings Nos. 3, 4, 5, and 6 are within the general understanding and definition of practicing law and should be enjoined."[50] The North Carolina court cites as the general rule that "services of the sort usually furnished by lawyers to their clients" constitute the practice of law.[51] This appears to be the best harmonization of the results of the decided cases. The legal profession has traditionally handled the collection of claims. The present decisions are making a certain part of that work their exclusive property.

It is clear from the above that the result of the decisions has been to restrict the activities of collection agencies. This trend has been explained as based upon a public policy to keep the handling of legal affairs in the hands of those specially trained for legal work and possessed of high moral character; and to maintain the confidential and personal relationship between attorney and client.[52] The first branch of this argument is rather superficial in its application to the problem of the collection agency, in that it assumes some definite standard as to what constitutes legal affairs—which is just the question which must be decided. Actually this is merely a general explanation of why the courts hold illegal the practice of law by those other than lawyers. The second branch of the argument is more fundamental. That the activities of the collection agencies in most cases do involve at least a technical impairment of the traditional confidential and personal relationship between attorney and client seems clear. Not so clear is the policy which dictates that any impairment of this relationship whatsoever should constitute the unauthorized practice of law. The courts, however, uniformly seize upon any impairment as constituting practice of the law by a collection agency, and uniformly refrain from explaining how the particular impairment harms the public, the client, or the attorney.

In most opinions no mention is made of the possible benefit or detriment to the

[50] Depew v. Wichita Ass'n of Credit Men, 142 Kan. 403, 416, 49 P. (2d) 1041, 1049 (1935).

[51] State *ex rel.* Seawell v. Carolina Motor Club, 209 N. C. 624, 184 S. E. 540 (1936). Accord, R. I. Pub. Laws 1935, c. 2190, §45, Creditors' Service Corp. v. Cummings, *supra* note 12.

[52] Note (1937) 10 So. CALIF. L. REV. 491.

business community of the complained of agency activities. In the *Depew* case a contention that the agency benefitted the community was mentioned by the court only to be rejected as immaterial on the question of practice of law. The same treatment was accorded the contention that the legal profession was attempting to maintain a monopoly and prevent competition in the collection business.[53] Economic protection of the legal profession may in fact be an underlying reason for the decisions but it is rarely made explicit.[54] Two cases have taken a strictly practical approach to the problem and have reached diametrically opposite results—one condemning[55] and the other upholding[56] the collection agency practices complained of.

More decisions similar in approach to these last two are needed. If the problem is to determine what degree of impairment renders the intervention by the lay agency undesirable, then certainly a careful examination of the character and effect of the agencies' operations should be undertaken. The decisions should reflect a practical determination of whether the collection agency activities complained of require the technical training of the lawyer, whether the ethical standard of collection agencies are observed and are adequate to protect the public. Other questions too should be faced. Does intervention by the lay agency jeopardize the independence of the legal profession? Do the operations of the agencies stir up unnecessary litigation and result in the oppression of debtors? Can a distinction be taken between the activities of "good" and "bad" agencies, even though their general plans of operation be the same? How efficient a collection service could the creditor obtain if the agency were withdrawn from the field? A frank consideration of these questions would certainly be conducive to a better understanding of the problem.

[53] Depew v. Wichita Ass'n of Credit Men, *supra* note 2.

[54] State *ex rel.* Freebourn v. Merchants' Credit Service, 66 P. (2d) 337, 344 (Mont. 1937) ("To excuse [collection agencies] from obeying the mandate of the statute or the unwritten rules which determine the character of the practice of lawyers acting in the same capacity, would be to impose an unjustifiable burden upon lawyers not imposed on individuals engaged in the same line of work.")

[55] *In re* Scott, *supra* note 44.

[56] Rinderknecht v. Toledo Ass'n of Credit Men, *supra* note 46.

DRAFTING OF REAL ESTATE INSTRUMENTS: THE PROBLEM FROM THE STANDPOINT OF THE REALTORS

HERBERT U. NELSON*

Everyone who buys a piece of real estate or who has a piece of real estate for sale would eventually be affected by the outcome of suits which have been brought by local bar associations in the courts of a great many of the states. These suits seek to outlaw the ordinary business practice under which the real estate broker, who must be licensed by state authority in 30 of the states,[1] draws up ordinary instruments of agreement that are an integral part of his work. These suits aim to prevent him from even filling out forms of agreement which after long study by the most able men in the business of real estate, after scrutiny by the most capable lawyers in the field of real estate law, and after wide tests in use have been adopted as standard. Brought on the ground that selecting and filling out such instruments constitutes unauthorized practice of law, the suits attempt to make it legally necessary to employ a lawyer to draw the papers involved each time at practically every step of every real estate transaction. Within the last five years such suits have been brought by the local bar associations in at least seven states. In at least six states bar associations have sought legislation which would achieve the same objective.

Public Welfare and the Development of Sound Real Estate Practice

The question raised is one whose eventual determination must be on the basis of the public welfare involved. This cannot be said too strongly. It is the first plank in any discussion such as we are here entering. And considerations of grave public importance are involved. What is more, the crucial and underlying issue is one that has had almost no public attention. These suits threaten a loss of primary conditions for the development of sound real estate practice. The prohibition they seek would jacket the function of drafting real estate documents and isolate it from direct practical real estate business experience.

Loss in our whole economic progress must result if the process of arriving at business agreements is forced always to be one man removed from the process of

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reducing these agreements to written form. Not the least such loss would be the loss of progress toward standard forms. As we develop a better understanding of real estate relationships, and of the contingencies that need to be provided for, we have come in recent years to standardize to a considerable extent the forms most commonly used in contracts to purchase, in leases, and the like. Standard forms tend to simplify business, eliminate confusion, avoid omissions. Any effort to block their use, if successful, would set business practices back a hundred years. Because this underlying issue is serious indeed, the National Association of Real Estate Boards, in a case recently before a Court of Appeals in Ohio,[2] entered as *amicus curiae* to set forth some of the considerations involved that have a very general significance.

Public Protection against Incompetent Drafting and Use of Real Estate Instruments

Now two words to clear away questions not here at issue. The public must be protected against incompetent and unauthorized persons representing themselves fraudulently to be attorneys at law or setting themselves up as qualified to act for another in matters requiring training in the law. That goes without saying. That contention is not involved. Vigilance to prevent unauthorized practice of law has the wholehearted support of real estate men as of every business group. Further, the public must be protected against incompetents and incompetent guidance in the preparation and use of the documents that are the instruments of its real estate transactions. This latter proposition, accepted by both sides, has in it the crux of the whole decision. So well is it recognized in the business of real estate that real estate boards have long and consistently led the movement for such protection.

Legal instruments to be used in real estate transactions should, of course, be drawn, or scanned after they have been drawn, by someone having a thorough knowledge of the law involved. That is elementary for the protection of everybody in the transaction. But to accomplish what is intended it is just as important for everybody's protection that they be drawn with a full understanding of real estate conditions, and of the business contingencies that are likely to arise. What really matters is that the provisions contained be economically sound and prudent.

Members of the bar in their individual work and bar associations over our whole history have given immeasurable service in aiding the development of real estate's legal and business structure. We need that service constantly, and shall continue to need it. But if, as seems self-evident, protection in the use of real estate agreements must derive not only from knowledge of their legal effect but also from knowledge of their pertinency to the individual real estate situation involved, then it is by no means wise public policy or in the public interest to limit the right to draw every instrument in every transaction so as to give a monopoly to a group of men completely external to the business of real estate. This is not the road to the most

[2] In the Matter of Unauthorized Practice of Law in Franklin County, Ohio (*In re* Gore), Court of Appeals, Franklin County, Ohio, No. 2755 (1938) 10 OHIO BAR 511. Brief presented by James M. Butler and Sol Morton Isaac as attorneys for the Association with Nathan William MacChesney, general counsel of the Association, as counsel.

efficient adjustment of individual agreements for the person of small or average means. Obviously, it is not the road to cutting costs of home ownership or real estate ownership. Nor is it a condition that stimulates ingenuity to find ways that will the most helpfully meet the changing needs of changing times. I submit that it is not the road that will bring the least difficulties and the least likelihood of loss for the average business transaction. Without failing for a moment to realize the constructive value of what lawyers are doing in conjunction with real estate development, we may well fear that a monopoly of the function of developing business instruments by any group external to a business would tend to impose a rigidity of form and procedure that would be costly and destructive.

The National Association of Real Estate Boards holds no brief for the sporadic non-lawyer who may hold himself out to be qualified to draw up legal documents for others for a fee, but it does hold that *a licensed real estate broker, not authorized to practice law, is competent, and should be permitted by law, to select, draft and complete preliminary contracts, simple deeds, simple leases, land contracts and mortgages,* if he does so in the course of his business to consummate transactions in which he is interested as agent or broker, and if he neither holds himself out to the public as one specially authorized to do these acts nor receives compensation for the preparation of these instruments.

"Authorized" Practice of Law and Legal Instruments

It may here be pointed out that if there be such a thing as the *unauthorized practice* of the law, there must be such a thing as the *authorized* practice of the law. Yet it is difficult to find any definition that fits the phrases. Lawyers and jurists have been satisfied with broad generalizations. Some of the state bar associations have frankly advised that there should be no attempt to formulate such definitions, and I believe I may say that the committee of the American Bar Association on this subject, headed by Mr. Stanley B. Houck, of Minneapolis, made it clear to my Association that the bar does not consider it possible or desirable that the so-called authorized practice of law shall be defined. In fairness, surely, there must come some attempt to establish frontiers or lines of demarcation.

Confusion in the use of the phrase "unauthorized practice of law" has its parallel in regard to the phrases "legal instruments" and "legal advice." What is a legal instrument? Does the mere fact that some business instruments are formal in language and employ some legal phraseology make them legal instruments? On the other hand, are not letters that commit clients and agents to specific agreements to be considered legal instruments? Unless we have a proper legal definition of what constitutes a legal instrument it is difficult to see how we can know what constitutes unauthorized practice of law. And such definition would have to divide not only business documents but much business correspondence into legal instruments and those which were not. Definition of authorized practice of the law might conceivably entail definition of "legal advice," which can be interpreted to mean advice

purely on the wording of the laws and the interpretation of such wording, but which in our general careless use of the phrase stretches to cover advice which lawyers today give their clients. A strict definition would hardly include the very ordinary tendency of lawyers to enlarge their opinions to cover what, in view of the law, would constitute prudent conduct on the part of the client. It can hardly be questioned that much advice given by lawyers in our present common practice is essentially business advice.

Certainly it is not at all clear what constitutes the essential difference between ordinary business instruments and those affecting real estate and other forms of property. Receipts given by a clerk to a purchaser, especially in these modern days when standard forms of warranty are in common use, are in no way different in any essential legal principle from instruments given in connection with real estate, as the brief *amicus curiae* in the Ohio case to which I have already referred points out. The importance and consequences of legal phraseology are equal in both. A contract to buy any piece of merchandise on installment payments is essentially no different from a land contract. Indeed, as the brief points out, the business man of every kind faces simple legal problems continuously in his ordinary daily work. "He makes, draws, and completes contracts; he drafts bills of sale, bills of lading, notes, checks, and drafts; he collects accounts and compromises claims. For the most part, his legal problems as they affect himself and those with whom he deals have become so commonplace and stereotyped as to be a part of his ordinary equipment. He thinks of them not as legal problems but as a normal adjunct of his business." Only when the problems become complex (and the good business man knows instantly) he goes to his attorney for advice and the benefit of his learning. If we are to have the sweeping requirement that the bar associations have recently been seeking, and make the requirement consistent, the lawyer will draw up every bill of sale.

The real estate business, and indeed many another business, is here entering an unexplored country, one with no clear-cut conception or definitions which the layman can study, one where he is constantly moving at his own peril without a knowledge of what the law is. It is the feeling of the National Association of Real Estate Boards that if the Bar Association desires to clarify this issue it should submit appropriate legislation to the various state legislatures that will clearly define what constitutes the practice of law, so that all citizens may know their rights and obligations in this respect, and so that no one going about the ordinary conduct of his business affairs need be subjected to legislation that is not in the books as such but that exists by reason of judicial interpretation by the various courts.

The Background of Real Estate Practicalities

Let us go briefly into some of the practicalities of real estate practice to set the question as realistically as may be before us. Real estate transactions, and particularly the purchase of homes, are undertakings of a kind that the ordinary person may very

well have occasion to enter into only once in his lifetime. Ignorance or incompetence in the choice of instrument or its drafting may in such a transaction be quite as fatal as downright fraudulent intent. But to effect the purposes of the parties buying, selling, leasing, or mortgaging real estate, the choosing and drafting of the instrument must be done in such a way as to take effective account of the practical purposes to be reached. It would fail in the very essential of their protection if from lack of knowledge of practical real estate situations it failed to hit the business purpose as accurately as our present business knowledge will permit. It would fail to protect the parties to the agreement if clauses were either omitted or included in such a way as failed to provide for contingencies that business experience has taught us are, under the given circumstances, likely to arise.

An excellent if extreme example of contingencies which need to be provided for as accurately as possible through experienced acquaintance with the encompassing business conditions is found in the drawing of those leases of retail business property space in which rent is based on a percentage of the tenant's gross business. Another is the drawing of long-term leases for, let us say, properties in the central business sections of our great cities, leases that not infrequently have to cover all necessary exigencies in regard to a multi-million dollar property for, say, a period of 99 years. A good draftsman of a real estate instrument of such complexity is one who is familiar with all the relationships that are involved between buyer and seller, landlord and tenant. Clearly, competence in the draftsmanship of many such a document is not dependent upon knowledge of the law solely. One may perhaps be pardoned if he should raise the question of the competence of all attorneys, in such a case, to draft the documents and agreements incidental to the real estate business.

Business Experience and Legal Acumen Can Be Mutually Helpful

In ordinary actual practice a happy working relationship is blending business experience and legal acumen in formulating the structure of our real estate business agreements. For their own guidance members of the National Association of Real Estate Boards some years ago appointed a committee of their own laymen from various parts of the country to draft a long series of provisions found useful in the making of a long-term lease. They studied for the purpose provisions in practical and successful use which had had the benefit of expert legal counsel in the process of their evolution. They analyzed items which should be considered in creating, selling, or appraising long-term leases. Under forty-four heads the final compilation listed some 350 items to be questioned in that process. Now many local real estate boards report that they are constantly in receipt of telephone calls and queries *from attorneys* concerning the provisions which such leases shall contain, in order that the documents may be sound and prudent ones. Real estate men can claim no monopoly of the recognition that, after all, it is the prudence and economic soundness of such documents and the understanding which they embody which is the important thing.

Again for their own guidance, members of the National Association of Real Estate Boards have recently published a study of percentage leases with a section giving selected clauses assembled from many leases now in effect. Here were included clauses establishing rental, defining "sales and business transactions" upon which the rental is to be a percentage, giving warranty to tenant, providing that no partnership be created, providing for possible default or bankruptcy of the tenant, opening the possibilities of "equalization," a clause providing for recapture of the premises under stated conditions of deficiency in rent payments, giving the tenant opportunity to make up the deficiency and retain possession. But—significant for this discussion—in publication of such clauses careful note was given that the forms *are not intended as a substitute for legal counsel,* and that in adapting them for use in a new transaction they must be carefully checked both in order that they may conform with the varying state laws and with the varying local business conditions.

Licensing and Ethical Requirements in Real Estate Business

In the practice of the law, the requirements set up for admission to the bar, and the code of professional ethics of the American Bar Association are recognized instruments for protection of the public against incompetence on the one hand and unethical conduct on the other. In real estate business practice, a fair parallel exists. Laws requiring every real estate broker to be licensed by a state authority which is charged with the responsibility of shutting out those incompetent or unworthy of confidence already exist in all our most populous states. In something like half the states a written examination is required and in all states the trend is toward higher requirements. The development of standards of business practice is the central purpose of the National Association of Real Estate Boards, and of its member boards over the country. To this end the Association in 1913 adopted a detailed code of business ethics and twenty-one years ago adopted the coined term Realtor to identify to the public persons bound, on penalty of expulsion from their real estate board, to observe that code, which has been kept a living expression of business conscience by revisions and additions. As in the last thirty years urban real estate use and value has become an increasingly complex subject, need of a rather high degree of technical preparation has become recognized, particularly in such branches of the business as appraisal and property management. Our specialized "Institutes" have concentrated on developing an understanding of the principles involved in these various branches, and some 70 colleges and universities have instituted real estate educational courses. At the initiative of the real estate business group a great National Real Estate Foundation is now in process of formation through which it is hoped to coordinate this whole movement of real estate research and real estate educational preparation to bring to public use in our real estate practice the immense body of facts and principles for which, for truly adequate public service, we will recognize that there is a need.

Two quotations from the Code of Ethics referred to are apt here:

Article 12: In justice to those who place their interests in his hands, the Realtor should endeavor always to be informed regarding the law, proposed legislation, and other essential facts and public policies which affect these interests.

Article 30: In closing transactions, the Realtor should advise the use of legal counsel when the interest of any party to the transactions appears to require it; and in all cases he should exercise care in the preparation of documents so that they shall embody the exact agreements reached.

Not only is it the accepted good practice in the real estate field to employ legal counsel and to advise clients and customers to employ such counsel when needed; it is an emphatically necessary business policy to do so. The prestige and volume of a real estate man's business depends not a little upon his ability to inspire confidence that he can serve the public in its real estate wants with a minimum of controversy or legal entanglements. In this, it has been pointed out, he is not unlike the attorney whose ability to inspire a like confidence is not considered a minor asset. One's license to do a real estate business, no less than his business advancement, would be jeopardized were he to draw instruments which lead his clients and customers into untold difficulties.

It is an essential part of the real estate man's competence to know when the matter of drafting an instrument is so complex as to call for legal counsel, or to know when it is beyond his own experience. But it is obvious that if, on the verge of writing every apartment lease, or rent receipt, every contract to purchase, every listing of a property for sale, every commitment to loan, every mortgage and every deed, the transaction must halt till an attorney comes in and prepares the paper, there will entail an almost immeasurable waste in time, in cost, in difficulty of getting any meeting of minds, and there might well arise a socially undesirable reluctance on the part of people generally to undertake the ownership of a commodity so bound with red tape and tortuous circumambulations. And upon the real question of public policy involved, I believe we should have lessened rather than strengthened the likelihood of reaching in the average case the instrument that would work best and fit best the need of the situation. We shall have attorneys deluged with trivialities, but we shall have each individual user of real estate limited perforce to such legal experience in the field of real estate as he himself individually can afford to employ. We shall not have the leaven that is now at work bringing to the ordinary small transaction, through standard forms and related discussions, a city-wide or national real estate experience focused through employment of counsel who have given a lifetime of study to real estate law.

Standard Forms and Practical Real Estate Experience

As we come to a better understanding of real estate, in its complex present-day use, and better understand what contingencies need be provided for, we have come to standardize, to a great extent, the forms most commonly used. Forms so evolved include a standard office lease, a standard lease for loft properties, a standard apart-

ment lease, a standard store lease, a standard extension of lease, a standard real estate management contract. These were evolved from examination, by business leaders representing every principal city in the country, of actual instruments that have been found most workable and successful. So formulated, they were scrutinized, thereupon, by an accepted authority on real estate law. Such standardized forms are made available only with the understanding that they must be checked for their adaptability to the varying state laws as well as the widely varying conditions of the localities or of the individual transactions.

It is our understanding that some of the local bar associations desire to do away altogether with all use of printed forms in the real estate business. In renting a large office building, for instance, some lawyers have contended that the use of a standard form of lease should be prohibited by the courts and that a lawyer should be engaged to write each individual lease for each individual office rented in such a building. Other lawyers have contended that in subdivisions, instead of using a printed contract or deed issued to lot buyers, there should be a lawyer employed to draft a separate instrument for each individual transaction in the subdivision. Obviously if printed forms, which have grown up through the experience of more than a hundred years, could not be used in such transactions and a great many others, a great deal of confusion as well as added cost would result.

Standardized procedure and standardized instruments and documents are as beneficial in the general business field as is the single price system in our stores. Any effort that would block such standardization and simplification is retrogressive in effect.

Uniform Conveyancing Blanks in Wisconsin

Wisconsin, under a statute which became effective January 1, 1920, provides uniform conveyancing blanks for the general use of its citizens.[8] Paul E. Stark, of Madison, president of the National Association of Real Estate Boards, reports that these are satisfactory and are generally used. The forms include warranty deeds, quit claim deeds, mortgages, land contracts, assignment of land contracts, assignment of real estate mortgages, partial release of mortgages, partial payment mortgage receipts, and satisfaction of real estate mortgages. Penalty for use of forms other than the uniform blanks is a 50% premium in registration fee. The suggestion for the Wisconsin uniform system of conveyancing blanks came originally from the Milwaukee office of the Register of Deeds, and drafting was done under the state group of registers of deeds. The movement was strongly supported from the beginning by the Milwaukee Real Estate Board, which appointed a committee to assist in drafting the forms.

A foreword to the published group Uniform Conveyancing Blanks of the State of Wisconsin (nos. 1 to 60 inclusive) recalls the first English parliamentary proposal for "some improvement in our method of transferring property,"—or, to go on with

[8] WIS. STAT. (1933), c. 235.

its quotation from Oliver Cromwell, the parliament-prodder of his own time—"enabling poor John Doe, who finds at present a terrible difficulty in doing it, to inform Richard Roe, 'I, John Doe do, in very fact, sell to Richard Roe, such and such a property,—according to the usual human meaning of the word sell: and it is hereby, let me again assure thee, indisputably SOLD to thee Richard, by me John,' which might be really an improvement." If we could rid all the documents incidental to real estate of useless legal verbiage and simplify them we should be doing much for the whole cause of real estate ownership and for the advantage of the whole body of our citizenry in their use of land and shelter.

Business Must Be Free to Embody Its Experience in the Instruments It Uses

"As the law of negotiable instruments grew from the Law Merchant, as the Uniform Sales Act is largely a codification of business practices, so business practices and policies must not be ignored in this comparatively new field," the brief filed by the National Association of Real Estate Boards in the Ohio case points out. This is especially true when it is considered how vitally general business may be affected by any decision on this subject. If, as conditions change, business is to develop instruments that are accurately and helpfully fitted to our social needs, it must be free to embody its experience as to what is sound practice in documents and agreements of its own making. Clearly much business law has thus crystallized. It would seem to be doubtful public policy to take away this freedom to develop its own forms of agreements, in accordance with the needs of the times, by imposing a compulsory obligation to employ lawyers to do such work, in other words, to make the drafting of real estate instruments a monopoly of the legal profession.

In the case of *People v. Jersin,*[4] the Supreme Court of Colorado has recently given an opinion very pertinent to this whole issue. Written by Mr. Justice Young, the opinion points out the weakness of the premise on which the action was brought, namely, "that all acts done by a lawyer and constituting a practice of his profession, if performed by a layman, constitute a practice of law by the latter." In discussing the broad aspects of the case, the Justice says:

> *"Business is not the outgrowth of the practice of law. The practice of law is the outgrowth of business.* . . . What constitutes the emergencies and the exigencies of business in large measure always have depended, and always will depend, on the custom and practice of those who carry on the country's business, and within reasonable limits such customs and practices should, indeed must, be recognized."

[4] 74 P. (2d) 668, 670 (1937).

DRAFTING OF REAL ESTATE INSTUMENTS: THE PROBLEM FROM THE STANDPOINT OF THE BAR

STANLEY B. HOUCK*

Since real estate transactions are seldom negotiated solely and directly by the parties to them, and are usually effected through agents or brokers, it is necessary, if what transpires is to be understood and fully appreciated, that the exact nature of the relationship and activities of such an intermediary be described and defined.

Of the province and functions of a real estate agent or broker the courts have said:

"A real estate agent is a person, who, generally speaking, is engaged in the business of procuring purchases or sales of lands for third persons upon a commission contingent upon success. He owes no affirmative duty to his client, is not liable to him for negligence or failure, and may recede from his employment at will without notice. On the other hand, courts almost unanimously unite in holding that, in case of an ordinary employment to sell, when he has procured a party able and willing to buy upon the terms demanded by his principal, and has notified him of the purchaser's readiness to buy, the agent's work is ended, and he is entitled to his commission. It is not his duty to procure a contract or to make one, and he is not in default if he fails to do either."[1]

"Strictly speaking, he is but a middleman whose office it is to bring the principals together, with the understanding that they are to negotiate with each other, and trade upon such terms as may be mutually satisfactory."[2]

"A sale of real estate involves the adjustment of many matters besides the fixing of the price. The delivery of the possession has to be settled, generally the title has to be examined, and the conveyance, with its covenants, is to be agreed upon and executed by the owner. . . . For these obvious reasons, and others which might be suggested, it is a wise provision of the law which withholds from such an agent any implied authority to sign a contract of sale in behalf of his principal."[3]

The initial step in any real estate transaction in which an agent or broker participates is his contract of employment. This arrangement runs the gamut of one

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[1] Carstens v. McReavy, 1 Wash. St. 359, 25 Pac. 471 (1890).

[2] Allison v. Fuller-Smith & Co., 20 Ala. App. 216, 220, 101 So. 626, 628 (1924).

[3] McCullough v. Hitchcock, 71 Conn. 401, 42 Atl. 81 (1899).

entirely implied, or one entirely oral, to an enlarged, written contract containing extreme provisions of questionable fairness.

There follows the negotiation of the deal.

No real estate transaction can be said to be unimportant. Whether it involves an inexpensive lot upon which the purchaser expects to build a home or a business property of greater worth, the undertaking, at least relatively speaking, is likely to be one of the most important in the lifetime of the buyer. Hence, as the deal develops, and as an accompaniment thereof, important and essential inquiries are, or should be, made. Their number, extent and character depend upon the circumstances of each case.

Because they are so important, it is clearly in the public interest that every inquiry necessary to safeguard a party's interests, especially those of the buyer, be made; that each be made by one qualified, competent, and authorized, or licensed, by law to make it; and that none be intrusted to one whose interests conflict with, or are adverse to, those of the person he serves. It is of paramount public importance that the buyer be not lulled into a sense of false security, into thinking or believing that essential investigations need not be made, or that they are being competently made by one entirely disinterested when such is not the case.

For example, if the property requires identification, location and general inspection, a surveyor or engineer licensed as required by law will be employed therefor. The architect to whom the buyer of improved property usually turns for added information and security is, also, qualified conformable to statutory requirements. For an audit of the receipts and disbursements of income-producing property, resort is usually had to the public accountant whose qualifications and competency have been certified following rigid inquiry and careful scrutiny. The examination of the title is facilitated by an abstract of title supplied by an abstractor whose responsibilities are well established and widely known and, usually, well insured; or the title may be insured by a licensed and publicly supervised insuror. Appraisals and value may be checked by a licensed real estate agent. Even the adequacy of the plumbing must be passed upon by one possessing a license granted under provisions of law or ordinance. The financing may be effected through a bank, a building and loan, or other financial institution similarly qualified, supervised and authorized to engage in such undertakings in the manner prescribed by statute.

Obviously, the one employed for any of the purposes mentioned should be trained, skilled and authorized to do the particular thing required. In many cases practical common sense and prudence suggest the desirability of employing more than one of those mentioned. In the more important transactions, all are employed as a matter of course. And, equally obviously, the architect should not be employed nor should he undertake to perform the work of the licensed real estate agent nor of the certified public accountant; or vice versa.

In respect of each of these inquiries, the real estate agent or broker finds his position difficult. He finds himself "on the spot"; his good faith, honesty and in-

tegrity challenged. For any of the investigations referred to may bring to light facts or conditions which will change an eager buyer into an unwilling one—and the deal may be spoiled. Hence, the self-interest of the agent whose compensation depends upon a ready, willing and able buyer, or seller, presents great temptations to avoid or evade the very important and necessary steps outlined above. As has been said, one in such a position must be prevented from either inducing the vitally affected party not to make appropriate inquiries or from allowing them to be made by one who is not competent or authorized to do so and who, besides, is directly interested and, perhaps, irretrievably affected by what is disclosed thereby.

When the negotiations have reached the point where the parties are ready, willing and able to deal, that fact, and the agent's performance of his undertaking, is often evidenced by a "binder," or earnest money, contract. If, when this point is reached, all prerequisites, of investigation, inquiry and the like, have been attended to, there is little need for the contract except to give the parties and their attorneys time to attend to the inquiries of a legal nature and to prepare the final closing contract or conveyance. However, in practice, these agreements run from very fairly and impartially expressed arrangements which give the purchaser every reasonable opportunity to investigate and inquire into every remaining thing necessary for his protection to an extreme which completely distorts the purpose of the contract; which lets the buyer beware; requires him to buy the property blindly and to take title "as is" without inquiry and without effort to protect himself. When an instrument of the last mentioned type is resorted to, it is usually for the brazen purpose of advantaging the seller and the intermediary, ruthlessly, at the expense of a careless or too-trusting purchaser.

When the transaction has reached this point, possibly even before the earnest money agreement has been executed—when the terms of the sale have been agreed to and nothing remains except to reduce them to writing—the function and the undertaking of the real estate agent is completed and ends. If he proceeds beyond that point he does so gratuitously and unnecessarily, possibly even officiously. If he does so he almost inevitably trespasses upon the domain of another's business or profession; and, at least conceivably, may be dealing with what he is neither qualified, competent, nor authorized in the public interest to handle.

By now it will be apparent that most real estate deals require the drafting and execution of one or more legal instruments: the contract of employment of the agent or broker, the "binder," or earnest money, contract, and the final, closing contract or conveyance. It is also evident that after all else has been arranged there remains to be made a number of vital inquiries of a strictly legal nature, among which are the state and condition of the title to the property the subject of the deal; the ability or disability, the capacity and competency, of a party to act as grantor or grantee of the entire estate to be conveyed; the existence, or non-existence, and the nature and maturity of liens or incumbrances and how they are to be dealt with; the general

form of, and the essential provisions to be included in, the closing agreement or conveyance; and the formal prerequisites of the execution and recordation thereof.

With purveyors of abstracts of title everywhere crying their wares, with title insurance companies insistently advertising the protection afforded and the high value given the insured by their policies, with statutes providing for Torrens titles to be considered, with numerous cases involving real estate always before our courts, it seems unnecessary to declare that real estate transactions do not follow a rigid pattern of identity or even similarity; that each differs substantially from another; that they are not susceptible of ready classification or standardization. Nevertheless there is a strange and unaccountable insistence on the part of those concerned with the sale of real estate, whether as principal or agent, to use so-called simple or standard forms of legal instruments, containing ready-made-to-order printed provisions to express the terms of their widely varying agreements.

Obviously, the provisions of the closing contract or conveyance must be adapted and responsive to very dissimilar facts, circumstances and conditions in respect of the state and condition of the title, the capacity and competency of the parties and the considerable range taken by the terms of their agreements. No mould, strait-jacket, nor standard form of expression, written or printed, simple or complex is appropriate. If they are suitable, it is the odd chance—the accident—perhaps, even, the miraculous.

Very naturally, the public, generally inexperienced in such matters, believes, especially when the idea is specifically suggested, that such "simple," or "standard" forms have general acceptation and universal use, that they have been "officially" adopted by some "authority" or that they have legislative sanction or approval; or that they have been "worked out" in some disinterested, neutral or impartial manner so as to reflect the utmost fairness to both parties.

Conveyancing is not so simple a matter as merely going to a book store and asking for a warranty deed or to a form book and copying one. It is not a purely mechanical or clerical process of transcription. But even if it were, one of inquiring mind is surprised at the number of radically different forms of the same instrument he is likely to find in the same store or in the same book of forms. There are short forms and long forms; forms with much and little fine print; forms whose provisions, or whose absence of provisions vary so greatly that their use in any particular case cannot possibly be optional or always appropriate.

Of this particular matter the American Bar Association's Committee on Unauthorized Practice of the Law said in its annual report to the Association for 1937:[4]

"No instrument is so fraught with potential danger and inquiry as is the so-called 'simple' or 'standard' property conveyance. In practically no cases are such instruments drawn by neutral or disinterested authorities. Too often, the initial document, the earnest money contract, is prepared solely in the interests of the realtor and the seller and in total disregard of the interests of the buyer. Too, as regards leases, they are filled often with fine print provisions in the landlord's interest and in utter disregard of the protection of the tenant."

[4] AM. BAR ASS'N, ADVANCE PROGRAM (1937) 165.

Because the unwary and inexperienced are so easily deceived and deluded by the badge of respectability apparently possessed by such instruments, an attempt to use them should be regarded, rather, as the red flag warning of danger ahead.

When a real estate deal, initiated perhaps by employment of an agent or broker, has been negotiated either with or without the intervention of an agent to the point where an earnest money contract is in order or the principal contract is being prepared and the terms of any of these contracts are to be reduced to writing, who may, or who should, draft and prepare the instrument?

If the parties are natural persons they may themselves, whether qualified or competent or not, attend to every detail, every incident, and every requisite of the transaction, and of the instruments necessary to consummate it. They are not obliged to allow or to employ anyone else to intervene, or intrude, or participate therein.

The capacity and competency of a party to the transaction to attend to whatever is necessary for his protection, unassisted, obviously does not depend upon its magnitude, whether measured absolutely or relatively. As a practical matter, he who is most experienced in dealing with real estate and is by his frequent participation in such deals most familiar with the steps essential to safeguard his interests, usually relies less upon himself and more upon those qualified and competent to do the particular thing needed.

From the standpoint of the public welfare serious problems begin to develop when a party feels the need of assistance of one more qualified, skilled and competent than himself.

Again the matter has been summarized by the same Committee of the American Bar Association in the same report:[5]

"The American Bar Association's Committee on Unauthorized Practice of the Law has sought continuously to ascertain to what extent the general public is benefited or harmed by laymen who draft legal documents. The investigation has been particularly zealous into instances where the compensation of the draftsman, usually a commission, for inducing the parties to deal with each other, depends on their executing the agreement he has drawn.

"The bar recognizes unconditionally that any person may act as his own lawyer and draft his own agreements, and never has evinced a desire to force a person to go to a lawyer for any purpose.

"If one feels incompetent, however, to draw his own agreements and must rely upon another party, it has been the unequivocal and unconditional position of the bar that one who has an interest adverse to that of one or both parties to the deal should not, and in the public interest must not, be allowed to draft the agreement. Such instruments might irretrievably affect the rights and interest of the parties, and their drafting must not be trusted to persons whose compensation depends entirely upon seeing that they are signed.

[5] *Ibid.*

"The foregoing applies especially to realtors who negotiate deals between buyers and sellers of real estate and who will not be paid if the deal falls through. . . .

"To enter safely into such a transaction calls for careful and thorough inquiry into many matters. If the inquiry is made, as it should be, before the parties are bound by any unsuitable and illadvised instrument, one of them may decide not to go forward with the deal. Obviously a party who may lose his compensation if inquiry discloses defects to defeat the deal ought not be permitted, in the public interest, either to make the inquiry or to induce the vitally affected parties not to have it made.

"Similarly, the one interested solely in 'putting over the deal and collecting his commission' and whose interest may be entirely wiped out if provisions are inserted in the agreement which will protect the interests of one or both of the parties, might be tempted to insert provisions in an instrument of his own drawing that would further his interest, to the irreparable damage of the interests of the parties. Mere common sense dictates that he should not be allowed to suggest that he can draw the vital instrument as well or better than an attorney and 'at no cost to the parties.' The 'cost' may not be discerned at the time, but eventually it may be more than a party can bear. . . .

"The legal profession recognizes that no persons having a conflicting interest should profit by drafting instruments or making investigations for others. One of the basic canons of ethics in the legal profession prevents an attorney from representing another in cases corresponding to the situation that arises when a real estate dealer negotiates a deal between two parties and acts for both."

To conclude: the real estate agent is an intermediary whose undertaking is definitely limited and restricted to finding purchasers, or sellers, of real estate and to negotiating with them to the point where one is ready, willing and able to buy and the other to sell. He is not required, for the accomplishment of his objectives, nor is he expected or permitted, to perform the functions of the surveyor, engineer, abstractor, insuror, accountant, or of any other profession or licensed employment. Nor is it in the public interest nor compatible with the public welfare that he induce another not to take appropriate and essential precautions or to make requisite investigations or that he, himself, undertake them when he is without the necessary qualifications, competency and license and his personal interests conflict and are incompatible with those of the person he serves.

REAL ESTATE BROKERS AND THE COURTS

HARRY WELLER HILL*

The services of real estate brokers have come to include the drawing of contracts, conveyances and other instruments essential to the closing of the transactions which they have negotiated. Exception to the performance of this service by persons not authorized to practice law has been taken by the legal profession in a series of cases, most of which are of recent date.

In defense of their practice, the real estate brokers have relied on the following contentions: (1) the drawing of legal instruments does not constitute the practice of law. (2) Even if the drawing of "complex instruments" may be the practice of law, this is not true of the drawing of "simple instruments." (3) Although the drawing of instruments solely for others may constitute the practice of law, the broker is entitled to draw instruments incidental to his business, or (4) for which he receives no compensation. (5) Where the broker is licensed by the state and his license is conditioned on a showing of knowledge of the principles of conveyancing law, he is entitled to draw real estate instruments. All these propositions, of course, do not appear in any single case, although two or more have been advanced in some cases. However, for the purpose of this note, the treatment accorded by the courts to each of these contentions will be considered separately.

(1) The first contention, that the drawing of legal instruments does not constitute the practice of law, finds little support in the cases. Although one case has held that the preparing and drawing of conveyances for others is not the practice of law[1] (which has since been overruled)[2] and one court has intimated that if legal advice were not given with the drawing of the instrument it might not be the practice of law,[3] the decisions overwhelmingly have held that the practice of law includes the preparation and drawing of legal instruments, such as warranty deeds, quitclaim deeds, mortgages, leases, building contracts, etc.[4] Some statutes which attempt to

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[1] Atlanta Title & Trust Co. v. Boykin, 172 Ga. 437, 157 S. E. 455 (1931); see dissent of Putnam, J., in People v. Title Guarantee & Trust Co., 180 App. Div. 648, 655, 168 N. Y. Supp. 278, 284, 285 (1917); dissent of McLaughlin, J., in People v. Alfani, 227 N. Y. 334, 343, 344, 125 N. E. 671, 674, 675 (1919).

[2] Boykin v. Hopkins, 174 Ga. 511, 162 S. E. 796 (1932).

[3] *In re* McCallum, 186 Wash. 312, 314, 57 P. (2d) 1259, 1260 (1936). However, the same court seems to assume that the drawing of instruments is the practice of law in *In re* Estes, 186 Wash. 690, 57 P. (2d) 1262 (1936).

[4] People *ex rel.* Los Angeles Bar Ass'n v. California Protective Corp., 76 Cal. App. 354, 244 Pac. 1089 (1926); Yeats v. Cunningham (Circ. Ct., Fla. 1936), BRAND, UNAUTHORIZED PRACTICE DECISIONS (1937)

define the practice of law specifically include the drawing of any paper relating to secular rights.[5] In *Opinion of the Justices,* the Massachusetts court said, "Practice of law under modern conditions consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court. It embraces conveyancing, the giving of legal advice on a large variety of subjects, and the preparation and execution of legal instruments covering an extensive field of business and trust relations and other affairs."[6]

Since conveyances and like instruments are in their very nature designed to transfer or at least affect certain rights and powers of individuals, then it is said that it is as important in the public interest that the drawing of such papers be done only by trained, licensed attorneys as that court work be handled only by them.[7] In the New York case of *People v. Alfani,* Crane, J., writing the opinion of the court, said, "Any judge of much active work on the bench has had frequent occasion to guide the young practitioner, or protect the client from the haste or folly of an older one. Not so in the office. Here the client is with his attorney alone, without the impartial supervision of a judge. Ignorance and stupidity may here create damage which the courts of the land cannot thereafter undo. Did the legislature mean to leave this field to any person out of which to make a living? Reason says no."[8]

(2) The contention which would except "simple instruments" from the operation of the rule established by the preceding cases has more judicial support. Some courts have made a distinction between the drawing of skeleton blank or stereotyped forms, such as a simple deed or mortgage not involving "special facts or conditions," and an instrument which must be shaped from a large number of facts, by holding that a layman may draw simple instruments for others without being engaged in the practice of law.[9] The most quoted statement for this position is in *In re Eastern Idaho Loan & Trust Co.* where the Idaho court said, "Defendants contend that their specially advertized activities do and did not constitute practicing law; that they but do and did what hordes of reputable insurance men, realtors, and bankers have been doing for years, and what chapter 192, sec. 2 of the Session Laws of 1929 authorized

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585; *In re* Matthews, 62 P. (2d) 578 (Idaho 1936); People *ex rel.* Ill. State Bar Ass'n v. People's Stock Yards State Bank, 344 Ill. 462, 176 N. E. 901 (1931); State *ex rel.* Wright v. Barlow, 131 Neb. 294, 268 N. W. 95 (1936); People v. Alfani, *supra* note 1; Cain v. Underwood (Dist. Ct., N. D. 1935), BRAND, *op. cit. supra* at 416; Land Title Abstract & Trust Co. v. Dworken, 129 Ohio St. 23, 193 N. E. 650 (1934); State Bar v. Farmers and Merchants Bank (Dist. Ct., Okla. 1936), BRAND, *op. cit. supra* at 545; Johnson v. Litster (Dist. Ct., Utah 1936), *id.* at 575; Paul v. Stanley, 168 Wash. 371, 12 P. (2d) 401 (1932); 22 OP. ATT. GEN. WIS. (1933) 827.

[5] See, *e. g.,* ALA. CODE (1928) §6248; 1 LA. GEN. STAT. (Dart, 1932) §443; 2 MISS. CODE (1930) §3710; 2 MO. REV. STAT. (1929) §11692; TEX. STAT. (2d Supp. 1934) art. 430a, §2.

[6] 289 Mass. 607, 613, 194 N. E. 313, 317 (1935).

[7] *Id.* at 614, 194 N. E. at 317.

[8] *Supra* note 1 at 339, 340, 125 N. E. at 673.

[9] People v. Title Guarantee & Trust Co., 227 N. Y. 366, 125 N. E. 666 (1919), discussed in the text, *infra,* p. 74; see Harman v. Berry, 2 Sup. Ct., D. C. (N. S.) 5 (1935); *In re* Eastern Idaho Loan & Trust Co., 49 Idaho 280, 285, 286, 288 Pac. 157, 159 (1930); People *ex rel.* Ill. State Bar Ass'n v. People's Stock Yards State Bank, *supra* note 4 at 477, 478, 176 N. E. at 908; Crawford v. McConnell, 173 Okla. 520, 523, 49 P. (2d) 551, 555, 556 (1935); *cf.* Cain v. Merchants Nat. Bank & Trust Co., 66 N. D. 746, 754, 268 N. W. 719, 723 (1936).

them to do. Such work as the mere clerical filling out of skeleton blanks or drawing instruments of generally recognized and stereotyped form effectuating the conveyance or incumbrance of property, such as a simple deed or mortgage not involving the determination of the legal effect of special facts and conditions, is generally regarded as the legitimate right of any layman."[10] In referring to this statement, the same court in *In re Matthews,* a decision holding that the drawing of simple deeds and real estate mortgages was the practice of law, said, to distinguish the two cases, "As a matter of fact, a careful reading of the said matter which immediately precedes the quotation relied upon by defendant Matthews at once discloses a mere mistake in punctuation, in this, that a period was used instead of a comma" between the two sentences quoted above.[11] It is submitted that this repunctuation of the earlier case does not change in the least the substance of its meaning, and hence the later decision in effect has overruled the earlier.

Other courts hold no distinction can be made—that the filling in of blank forms or the drawing of simple instruments is just as much the practice of law as the drawing of a very complex document.[12] Although in *People v. Title Guarantee & Trust Co.,*[13] the opinion of the court, prepared by Hiscock, C. J., rested the reversal of a conviction for the unlawful practice of law on the basis of this distinction, the distinction was repudiated by four of the seven judges and not relied upon by a fifth. In concurring in the result on other grounds, Pound, J., said, "I am unable to rest any satisfactory test on the distinction between simple and complex instruments. The most complex are simple to the skilled, and the simplest often trouble the inexperienced."[14] In a dissenting memorandum prepared by Cardozo, J., for himself and two other judges, Judge Pound's view was expressly adopted.

Even in the preparation of a simple instrument of blank form, some courts feel a layman does not know definitely that such an instrument is suited to the particular circumstances, for he does not know ordinarily the exact legal effect of the stereotyped words and clauses in the instrument. Therefore the filling in of a printed form has been held to constitute a determination of the legal effect of special facts and conditions.[15] In *In re Gore,* an Ohio Common Pleas court made this statement: "While some confusion seemingly has arisen with reference to the mere 'filling in of blanks' as it is expressed, there can be no doubt that the selection of the form to be used and that the determination by the broker of the suitability and adaptability of the form to the circumstances of the transaction involves the exercise of legal skill and learning."[16]

The American Bar Association Committee on Unauthorized Practice has said that

[10] *Supra* note 9 at 285, 286, 288 Pac. at 159. [11] *In re* Matthews, *supra* note 4 at 581.

[12] Clark v. Reardon, 104 S. W. (2d) 407 (Mo. App. 1937); Cain v. Underwood, *supra* note 4; *In re* Gore (Common Pleas Ct., Ohio 1936), BRAND, *op. cit. supra* note 4 at 472, *aff'd,* Ohio Ct. of App. 2d. dist., Dec. 30, 1937 (1938) 10 OHIO BAR 511; State Bar v. Farmers and Merchants Bank, *supra* note 4; Paul v. Stanley, *supra* note 4.

[13] *Supra* note 9. [14] *Supra* note 9 at 379, 125 N. E. at 670.

[15] *In re* Rathke (Circ. Ct., Mich. 1936), BRAND, *op. cit. supra* note 4 at 614, *In re* Gore, *supra* note 12.

[16] *In re* Gore, *supra* note 12.

it is not against public interest for one not licensed to fill in the blanks of legal instruments appropriately, if they have been selected by one licensed to practice law, and are used for the particular purpose only within a reasonable time after such advice and selection.[17]

(3) The real estate brokers' contention that they may draft instruments for the parties to transactions which they have negotiated rests on the principle that anyone who is a party or principal in a transaction may draw the instruments or do any other legal work in relation thereto.[18] As stated in *Judd v. The City Trust & Savings Bank,* "Since practicing law involves the performance of services for others, any individual is accorded the right to do his own legal work either in court or out."[19] The courts are divided whether this principle may be extended to protect the broker who, though neither party nor principal, yet has a substantial interest in the transaction.

In the Pennsylvania case of *Childs v. Smeltzer,* it was said that if the drawing of an instrument, such as a deed or lease, is a concomitant of an unlicensed person's business, or grows out of a business transaction in which he is interested, he may prepare such a paper for the parties.[20] The court in this case said, "A real estate broker is not prohibited from drawing a deed or conveyance or other appropriate instrument relating to property of which he or his associates have negotiated a sale or lease."[21] Under this view it seems immaterial whether the instrument is a blank form, simple, or complex, although one case stated that an unlicensed person may draw simple deeds and mortgages if they are incidental to transactions in which he is interested, provided no charge is made.[22] The *Childs* case is in conflict with the decisions of three courts,[23] two of which state that it is not sound to allow a real estate broker to draw such instruments because he has a conflicting interest arising from the fact that his compensation depends upon the successful closing of the transaction.[24] No court seems to have adverted to a further reason advanced by the American Bar Association Committee on Unauthorized Practice, which said, "Almost every phase of the law would be deemed to be, by the various trades, pro-

[17] 61 AM. BAR ASS'N REP. (1936) 711.

[18] Copeland v. Dabbs, 221 Ala. 489, 129 So. 88 (1930); State Bar v. Farmers and Merchants Bank, *supra* note 4.

[19] 133 Ohio St. 81, 91 (1937). If an unlicensed person acts as an amanuensis in drawing an instrument as dictated to him by a principal to the transaction, such as a vendor or purchaser, he is held not to be practicing law. State *ex rel.* Wright v. Barlow, *supra* note 4; Land Title Abstract & Trust Co. v. Dworken, *supra* note 4. For example, if an unlicensed person were to draw an instrument for himself by dictating it to a stenographer, or were to tell the stenographer to obtain a certain blank form and insert data therein which he has given her, the stenographer would not be engaged in the practice of law, for the selection of the instrument and the determination of the material to be put in is the act of the employing party, the stenographer merely performing the mechanical act of recording.

[20] 315 Pa. 9, 171 Atl. 883 (1934); see also Pound, J., in People v. Title Guarantee & Trust Co., *supra* note 9 at 380, 125 N. E. at 670.

[21] Childs v. Smeltzer, *supra* note 20 at 14, 15, 171 Atl. at 886.

[22] Cain v. Merchants Nat. Bank & Trust Co., *supra* note 9 at 754, 268 N. W. at 723.

[23] *In re* Brainard, 55 Idaho 153, 39 P. (2d) 769 (1934); *In re* Abbey (Circ. Ct., Mich. 1934), BRAND, *op. cit. supra* note 4 at 244; *In re* Gore, *supra* note 12.

[24] *In re* Abbey, *supra* note 23; *In re* Gore, *supra* note 12.

fessions, businesses, and 'services,' purely ancillary and incidental to some one or more of them."[25]

(4) The importance of the fourth contention, relating to the presence or absence of compensation, rests on the fact that real estate brokers who draw papers for their clients generally make no charge therefor where they are effectuating a deal for the parties. Some statutes which attempt a definition of the practice of law state that the drawing of instruments is the practice of law where done for a consideration,[26] reward,[27] or pecuniary benefit, present or anticipated.[28] In England, a layman was not fined for transacting business pertaining to the office of a public notary unless he did so for or in expectation of any gain, fee, or reward.[29] Most courts have taken the view that a consideration or compensation is needed before the preparing of legal papers can be said to be the practice of law.[30] If there is compensation in money, the drawing of instruments is yet the practice of law even though the compensation may not be paid by the client.[31] The amount of the consideration is also immaterial.[32]

Since, even where the preparation is done without a charge, the parties to a transaction are, of course, still liable to be injured if the layman preparing the papers is ignorant or inexperienced, the American Bar Association Committee on Unauthorized Practice has argued that "the presence, or absence, of consideration is not a proper distinguishing element by which to determine the existence of unlawful practice. Whether or not it is present in no way limits the injury to the profession, or, what is more important, to the public."[33] Two cases substantiate this position by holding that even without compensation the drawing of deeds, mortgages and similar instruments for others by a layman constitutes the unlawful practice of law.[34] In *State ex rel. Wright v. Barlow,* the court said, "Defendant insists that to constitute the practice of law one must hold himself out as a licensed attorney and receive a fee for his service. We think that this claim is not well founded. . . . It might as well be said that a surgeon who performs, without fee or reward, a tonsillectomy or appendectomy is not practicing surgery."[35]

The defense that no compensation is received for drafting papers must be interpreted to mean that no payment is received specifically for this service. The drawing of instruments is one among several services which a real estate broker performs, and for which he is compensated in a lump sum in the form of his commission. Thus,

[25] 60 AM. BAR ASS'N REP. (1935) 534.

[26] MO. REV. STAT., *supra* note 5; see State *ex inf.* Miller v. St. Louis Union Trust Co., 335 Mo. 845, 74 S. W. (2d) 348 (1934) holding that the nomination of a trust company as executor or trustee was a "valuable consideration" for the drafting of wills and trust agreements.

[27] MISS. CODE, *supra* note 5.

[28] ALA. CODE, *supra* note 5; LA. GEN. STAT., *supra* note 5; TEX. STAT., *supra* note 5.

[29] 6 & 7 VICT., c. 90 (1843).

[30] Yeats v. Cunningham, *supra* note 4; Childs v. Smeltzer, *supra* note 20; Paul v. Stanley, *supra* note 4; see Clark v. Reardon, *supra* note 12 at 409.

[31] Ferris v. Snively, 172 Wash. 167, 19 P. (2d) 942 (1933).

[32] See *In re* Matthews, *supra* note 4 at 580.

[33] 60 AM. BAR ASS'N REP. (1935) 533.

[34] State *ex. rel.* Wright v. Barlow, *supra* note 4; State Bar v. Farmers and Merchants Bank, *supra* note 4.

[35] *Supra* note 4 at 296, 297, 268 N. W. at 96.

there is a consideration or compensation for this service in a broad sense. Of course, his commission is not paid solely for his having drafted the instruments to the transaction for the parties, but it is also assertable that neither is his bringing together of the vendor and purchaser or lessor and lessee the entire object for which his commission is paid. Whether or not a real estate broker draws papers for a direct charge, his purpose is to bring the transaction to a close and thereby make a profit in the form of a commission. Hence it would be difficult to find an instance where no compensation existed.[36]

(5) That the drafting of legal instruments for others has not always been the exclusive province of the lawyer is shown by the fact that public notaries in England have had the privilege of writing conveyances of realty and of drawing legal instruments for others.[37] Still, this privilege could not be engaged in by the ordinary layman, but was limited to these notaries in order to protect the public against inexperienced persons.[38] In order to ensure trained persons for this work, no one could be admitted as a public notary in England until he had actually served seven years as an apprentice,[39] and an applicant was subject to be required to show character qualifications.[40] Any person doing anything for gain pertaining to the office of a public notary was subject to a fine of £50,[41] and if a public notary allowed his name to be used for the profit of another person not entitled to act as a public notary, he should be forever disabled from practicing as a public notary.[42]

Against the contention that, since the judiciary has the inherent power to define and regulate the practice of law, any legislative enactment which stultifies this power is unconstitutional,[43] the existence of this privilege on the part of notaries in England might afford a basis for sustaining a statute according like powers to notaries (and even real estate brokers) in this country, at least if they were required to meet comparable standards. However, it is scarcely precedent for an extension of the privilege to persons not specially authorized to perform such acts. Two statutes do

[36] In a copyright infringement action wherein a restaurant orchestra had performed a copyrighted musical composition without charge for admission, it was held to have performed the work publicly "for profit." In speaking for the court Mr. Justice Holmes said, "The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item [food] which those present are expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. . . . If music did not pay, it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is enough." Herbert v. The Shanley Co., 242 U. S. 591, 594, 595 (1917).

[37] 24 HALSBURY'S LAWS OF ENG. (2d ed. 1937) §1; Hutcheon v. Mannington, 6 Ves. 823, 824 (Ch. 1802). *Notaires* in France are also allowed to draft instruments. FRENCH CIVIL CODE (Wright's trans. 1908) arts. 971, 972, 1317, and 2127. Notaries in this country are unlike the continental notaries. As said by Crane, J., "Only in the name is there a correspondence to the continental official." People v. Alfani, *supra* note 1 at 340, 341, 125 N. E. at 674.

[38] 2 HALSBURY'S LAWS OF ENG. (2d ed. 1931) §682; Taylor v. The Crowland Gas & Coke Co., 10 Exch. 293 (Ex. 1854).

[39] 41 GEO. III c. 79 (1801). The King v. Scriveners' Co., 10 B. & C. 511 (K. B. 1830).

[40] 6 & 7 VICT., c. 90 (1843).

[41] *Ibid.*

[42] 41 GEO. III, c. 79 (1801).

[43] Muenier v. Bernich, 170 So. 567 (La. App. 1936); Opinion of the Justices, *supra* note 6.

allow a real estate broker to draft instruments for the parties to a transaction he has negotiated,[44] and a statute of Delaware allows any person on payment of a license fee to draw conveyances and any other papers, no qualifications apparently being required.[45]

In a number of states, real estate brokers are required to be licensed, although the statutes are silent as to whether the privilege to draft instruments is conferred by the license. As a prerequisite to obtaining a license, in a few of these states, the statute requires the applicant to pass an examination, showing among other things that he has a fair knowledge of the principles of real estate conveyancing pertaining to deeds, mortgages, land contracts, leases, etc. A New York statute is as follows: "In determining the competency, the department shall require proof that the applicant for a broker's license has a fair knowledge of the English language, a fair understanding of the general purposes and general legal effect of deeds, mortgages, land contracts of sale, and leases, a general and fair understanding of the obligations between principal and agent, as well as of the provisions of this act, and that he has been engaged in the real estate brokerage business for a period of not less than one year immediatly preceding the date of filing his application for a license under this article."[46] A Michigan statute, after providing for an examination of the applicant's character, adds the provision: "The Commission shall also require each applicant for broker's license to pass an examination establishing, in a manner satisfactory to the commission, that the applicant has . . . a fair understanding of the laws and principles of real estate conveyancing, deeds, mortgages, land contracts, leases, the obligations of a broker to the public and his principal, . . ."[47] Since licensed real estate brokers in these states have some training and experience, they cannot be said to fall precisely in the category of an untrained layman.[48]

In the only case to interpret a licensing statute of this character, *Detroit Bar Association v. Ward,* a Michigan circuit court was apparently of the opinion that a "fair understanding" of conveyancing was insufficient to qualify a real estate broker to draw leases, contracts, and deeds for others. In that case the court said, "We all realize that in the writing of examinations on certain subjects that a certain general knowledge of many subjects is required but I do not feel in this instance it would go so far as to admit of a real estate broker being entitled to give out information with regard to law and the drafting of legal instruments because the rules of the Securities Commission pertaining to the examination of real estate brokers demanded certain questions with respect to law and legal papers be included in the examination."[49]

Although there have been a few statements and intimations that an isolated act or a single transaction, such as the drawing of one instrument for another without

[44] 1 MD. ANN. CODE (Bagby, 1924) art. 10, §1 (as to several counties); R. I. Acts & Resolves, Sp. Sess., 1935, c. 2190, §46, cl. B, par. 7.

[45] DEL. REV. CODE (1935) §§193, 194.

[46] N. Y. CONSOL. LAWS (Cahill, 1930) c. 51, §441.

[47] 2 MICH. COMP. LAWS (1930) §9813.

[48] There is some similarity between the qualifications required in the above and similar statutes concerning the English notary.

[49] (Circ. Ct., Mich. 1934), BRAND, *op. cit. supra* note 4 at 249, 252, 253.

making a practice of doing such, will not constitute the practice of law,[50] and two New York cases have so held,[51] two other courts have held that such isolated acts are nevertheless the practice of law.[52] But if the acts of unlawful practice are infrequent and few, no injunction will be granted against the future occurrence of similar acts where they are unlikely to happen.[53] The American Bar Association Committee on Unauthorized Practice has said that "there seems to be no good reason why the acts of one who has no right to do what he is attempting to do should be altogether free from challenge until and unless his conduct has the continuity of, or has reached such volume that it is a 'practice,' 'business,' or a 'profession' ".[54] However, the Committee also added that "it has no slightest desire that steps to eliminate unlicensed acts be based on technicalities, or on occasional sporadic, isolated, acts."[55]

Real estate problems have given rise to a number of points of controversy between the bar and lay agencies other than those relating to the drafting of legal documents. For example, the handling and prosecuting of eviction proceedings[56] and foreclosure proceedings[57] by an unlicensed person or a corporation for its landlord clients is considered to be the unlawful practice of law. The activities of abstract and title companies have been especially prolific of litigation in this field, but these cases lie outside the scope of this note.[58]

[50] Crane, J., in People v. Title Guarantee & Trust Co., *supra* note 9 at 615, 125 N. E. at 671; Childs v. Smeltzer, *supra* note 20 at 14, 191 Atl. at 885; 22 OP. ATT. GEN. WIS. (1933) 828. In Opinion of the Justices, *supra* note 6 at 615, 194 N. E. at 317, the court said, "The occasional drafting of simple deeds, and other legal instruments when not conducted as an occupation or yielding substantial income may fall outside the practice of the law."

[51] People v. Goldsmith, 249 N. Y. 586, 164 N. E. 593 (1928), *reversing* 224 App. Div. 707, 229 N. Y. S. 896 (1928); People v. Weil, 237 App. Div. 118, 260 N. Y. Supp. 658 (1932).

[52] Wayne v. Murphey-Favre & Co., 56 Idaho 788, 59 P. (2d) 721 (1936); *In re* Rathke, *supra* note 15.

[53] Cain v. Merchants Nat. Bank & Trust Co., *supra* note 9.

[54] 60 AM. BAR ASS'N REP. (1935) 535. [55] *Id.* at 536.

[56] Heiskell v. Mozie, 65 App. D. C. 255, 82 F. (2d) 861 (1936); Harman v. Berry, *supra* note 9; Yeats v. Law (Circ. Ct. Fla. 1934), BRAND, *op. cit. supra* note 4 at 324; Chicago Bar Ass'n v. Nat. Landlords Ass'n (Super. Ct., Ill. 1936), *id.* at 583; Unger v. Landlords' Management Corp., 114 N. J. Eq. 68, 168 Atl. 229 (1933); Bennett v. Tenants Research Bureau (Sup. Ct., N. Y. 1936), BRAND, *op. cit. supra* at 562 (consent decree); Dworken v. Department [Apartment] House Owner's Ass'n, 28 Ohio N. P. Rep. 115 (1930). A contrary decision is Sharp-Boylston Co. v. Haldane, 182 Ga. 833, 187 S. E. 68 (1936), but this decision has been nullified by a later statute in Georgia which provides that no party shall prepare or file affidavits based upon dispossessory warrants, distress warrants, or attachments, or prosecute the proceedings through any agent or employee who is not a duly licensed attorney-at-law. Ga. Laws 1937, p. 753.

[57] *In re* Otterness, 181 Minn. 254, 232 N. W. 318 (1930).

[58] The cases are collected in BRAND, *op. cit. supra* note 4 at 764.

THE ESTABLISHMENT OF CORDIAL RELATIONS BETWEEN THE BAR AND THE CORPORATE FIDUCIARIES

JOHN G. JACKSON*

As the title to this article indicates, relations between the legal profession and corporate fiduciaries have not always been cordial. Sufficient evidence of this can be found in the history of litigation between the two.[1] In all of these cases the courts have passed upon the question of whether or not a corporate fiduciary can prepare wills, trust agreements, escrows and like documents for its customers, and the almost unanimous holding of the courts is that such services constitute the practice of the law by or on behalf of a corporation and are unlawful.

These practices grew out of the efforts of banks and trust companies to increase their fiduciary business. Personal trust departments forty or fifty years ago were small affairs compared to their present size. Business was very definitely increased by the solicitation of the bank's customers, who were persuaded to draw wills naming the bank as executor and to create trusts of which the bank was trustee. Competition between the banks and trust companies themselves increased the efforts to secure this type of business, and offering preparation of wills and trust agreements without charge was not an unnatural development. Thus this practice spread, and no organized effort to end these methods of securing business was made prior to 1913, when the New York County Lawyers Association created a committee on the unlawful practice of the law.

In 1917 the Appellate Division of the New York Supreme Court handed down the first decision by an appellate court holding a trust company guilty of the crime of practicing law in violation of a statute limiting the right to practice law to duly qualified and duly admitted individuals.[2] In that case the defendant trust com-

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[1] The cases are collected in BRAND, UNAUTHORIZED PRACTICE DECISIONS (1937) 780. To this list should be added Judd v. City Trust & Savings Bank, 133 Ohio St. 81 (1937); Detroit Bar Ass'n v. Union Guardian Trust Co., 276 N. W. 365 (Mich. 1937); Detroit Bar Ass'n v. Detroit Trust Co. 276 N. W. 372 (Mich. 1937); Detroit Bar Ass'n v. Equitable Trust Co., 276 N. W. 372 (Mich. 1937).

[2] People v. People's Trust Co., 180 App. Div. 494, 167 N. Y. Supp. 767 (1917).

pany had advertised that it would furnish without obligation advice as to the making of wills. A prospective customer came to the defendant with a copy of the advertisement. A trust officer called up an attorney connected with the defendant's regularly retained firm of lawyers, who came to the office, took the customer's instructions, drafted the will and on the following day supervised its execution. The defendant trust company was named as executor and no charge was made for the lawyer's services. Subsequent decisions on similar litigated controversies have supported the view of the New York court.

As the opposition of the bar to these practices increased the controversy became more severe. Lawyers who opposed the practice of corporations furnishing legal services were charged with being moved by selfish motives alone and that the end really sought was to retain to themselves appointment as executors and trustees. It was claimed that only lawyers specially experienced in trust company work were competent to draw wills and trusts. The lawyers retorted that the fiduciaries were commercializing the practice of the law for their own benefit and that advice given by the fiduciaries' lawyers to prospective trustors and testators was not the disinterested advice which a lawyer owed to his client. And so the matter went along until about ten years ago, when efforts to end the controversy were really undertaken by both the lawyers and the fiduciaries.

At the outset it was difficult to bring about a settlement of local controversies and a good deal of litigation resulted. However, both the Committee on Relations with the Bar of the Trust Division of the American Bankers' Association and the American Bar Association Committee on the Unauthorized Practice of the Law continued their earnest efforts toward bringing about a proper respect for and recognition of the rights both of the bar and of the fiduciaries. Local associations of fiduciaries and lawyers, "made wiser by the steady growth of truth," finally sat down together to find a way to end a controversy which profited neither. This attitude was well illustrated in 1931, when the American Bar Association held its annual meeting at Atlantic City. In connection with that event the Committee on Unauthorized Practice held an open meeting to discuss the relations between corporate fiduciaries and the bar, which was addressed by Mr. Merrel P. Callaway, head of the Trust Department of the Guaranty Trust Company of New York. He stated in substance that it was his belief that the banks and trust companies of New York did not practice law or desire to practice law; that they did not furnish attorneys to draw wills or trust agreements, nor have it done at their expense by any other attorneys; that it was not only their practice but their desire to have wills and trust agreements drawn by the testator's or trustor's own attorney; and that the responsibilities of administering such estates under modern conditions were great enough without assuming the responsibility for the drawing of the instrument, regardless of any legal right to do so. Nothing could have been more helpful toward a better relationship than Mr. Callaway's statement at that time.

Both the committee of the Trust Division and that of the American Bar Association urged a spirit of conciliation and fair play and that every reasonable effort be made to dispose of controversial questions by negotiation and agreement, rather than by litigation. The result has been that bar associations and fiduciary associations have agreed in over 33 instances on a joint declaration of acceptable principles.[8] In other instances consent court decrees establishing principles agreeable to both parties have terminated law suits that otherwise would have gone through the usual course of delay and expense and resulted in increased antagonism. While it would be interesting, it would require far too much space to analyze the different types of declarations and the different subjects covered by them. Many of them reflect local conditions, but it is generally true that in all of them are found the principles approved and adopted in 1933 by the American Bankers' Association and later made a part of the Code of Fair Competition for Bankers. Among the more important of these principles are the following:

"With respect to the acceptance of personal trust business the two determining factors are these: Is trust service needed, and can the service be rendered properly?" (Article II, Sec. 1)

"It is the duty of a trustee to administer a trust solely in the interest of the beneficiaries without permitting the intrusion of interests of the trustee or third parties that may in any way conflict with the interests of the trust." (Article III, Sec. 3)

"A trust institution has the same right as any other business enterprise to advertise its trust services in appropriate ways. Its advertisements should be dignified and not overstate or overemphasize the qualifications of the trust institutions. There should be no implication that legal services will be rendered." (Article VI, Sec. 1)

"Attorneys-at-law constitute a professional group that perform essential functions in relation to trust business and have a community of interest with trust institutions in the common end of service to the public. The maintenance of harmonious relations between trust institutions and members of the Bar is in the best interest of both and of the public as well. It is a fundamental principle of this relationship that trust institutions should not engage in the practice of law." (Article, VII, Sec. 2)

These principles thus publicly accepted by the fiduciaries recognize clearly that they may not render legal services to prospective testators or trustors and the necessity of undivided allegiance at all times. While the Bankers' Code does not in terms state that the prospective testator must receive the advice of his own counsel free of divided allegiance, any contrary view would be clearly inconsistent with the principle which it does state that it is the duty of a trustee to administer a trust solely in the interest of the beneficiaries without permitting the interests of the trustee in any way to conflict.

No less important rules are applicable to members of the bar. First of all, there can be no doubt that except for the participation of members of the bar representing

[8] Many of these are collected in HICKS AND KATZ, UNAUTHORIZED PRACTICE OF LAW (1934), Pt. III, pp. 122-171.

fiduciaries in the preparation of wills and trusts, no serious controversy between the fiduciaries and the lawyers could have arisen.

Then, again, the question of whether or not a divided allegiance exists in violation of the canons of ethics governing the lawyer's conduct is primarily a question for the lawyer's conscience, the answer to which may be properly accepted in most—not all—cases by the fiduciary. Finally, as the New Jersey statement of principles puts it:

"An attorney, consulted or employed by a client with respect to the appointment of a Corporate Fiduciary, selected by the client, in any fiduciary capacity, shall not directly or indirectly influence the client against appointing or having appointed the specified Corporate Fiduciary unless the attorney, in good faith, believes that such Corporate Fiduciary should not be appointed."[4]

The general situation today is in accord with these principles. If it is not altogether perfect, it is to be remembered that perfection is not attainable in any endeavor, and there can be no doubt of the existence of the right spirit between the two organizations, and that being so, it will solve the problems that will arise from time to time in the future. The truth of this is well illustrated by an excerpt from the 1937 report of the Committee on Relations with the Bar of the Trust Division of the American Bankers' Association. Mr. H. O. Edmonds, Chairman of that Committee, said:

"At the annual meeting of the American Bar Association at Boston last August a resolution was offered asserting that state legislation should be enacted making it unlawful for any corporation to advertise that it will act as executor, trustee, guardian, etc. because in so doing it will inevitably be 'practicing law.' This resolution was in due course referred to the Committee on Unauthorized Practice. It was reported unfavorably by that Committee to the House of Delegates of the American Bar Association on January 6th, 1937 and was unanimously rejected by the Delegates.

"It is the belief of the Chairman of the Committee that a well selected committee on this subject should at all times be ready and able to function, but that in the normal course of things and unless some controversy arises having general importance, the Committee need not be actively engaged.

"In both the Bar and Trust organizations a steadily increasing disposition was noted to respect each other's rights and to recognize the outstanding and all important fact, which is, that the law is a profession and trusteeship is a business, and that neither one should arrogate to itself the professional status or business status of the other."

As Mr. Edmonds states, the importance of a correct relationship between the fiduciaries and the bar rests on basic principles. These are also recognized in the declaration of the Bankers' Code that attorneys-at-law constitute a professional group that perform essential functions in relation to trust business and have a community of interest with trust institutions in the common end of service to the public. The unlawful practice of the law was selected several years ago as one of five subjects to constitute the National Bar Program of the American Bar Association to coordinate

[4] *Id.* at 148.

the efforts of bar associations throughout the country in an effort to improve the administration of justice. This selection was made because it had importance far beyond keeping peace between the lawyers and the bankers and beyond preventing title companies, collection agencies, automobile clubs, credit bureaus and innumerable other agencies of one sort or another from furnishing legal services.

Laymen and, indeed, certain lawyers, are apt to view the work of a committee on the unauthorized practice of the law as one of self-preservation for the benefit of the bar alone, but this view is completely wrong and without logical support. As a matter of fact, legal services rendered by or under the direction of laymen are more likely than not to create work for lawyers.

It would be easy enough to describe the evils attending unlawful activities on the part of laymen and corporations in practically every branch of the law, but for purposes of illustration let us consider only some of the questions presented in drawing a will and upon which the lawyer must advise *his* client.

(1) Should there be a corporate executor or trustees at all? Many instances occur where the fees payable to a corporate fiduciary could to better advantage remain in the testator's family.

(2) Is the particular corporation a satisfactory appointee for the particular estate or trust? The prospective fiduciary's attorney can give but one answer to this question and hold his job.

(3) Should there be a trust at all? A trust is not always desirable. Yet the more trusts, the longer the trusts and the larger the trusts, the more is the money earned by the trustee in fees. Would it not be difficult for the prospective trustee's attorney to advise fewer trusts, shorter trusts and smaller trusts?

(4) What should be the powers and responsibility of the trustees? In *Matter of Knower*[5] the will provided: "I direct that such trustee be not confined in making investments to such securities as are authorized by law for the investment of trust funds, but that he shall be at liberty to invest in such stocks, bonds or other securities as he may deem proper, and that he shall not be liable for any loss unless occasioned by his actual fraud." The trustee invested in non-legal securities and resultant losses reduced the trust to almost half of the original corpus. The Court found that the trustee had been improvident and negligent but had not been guilty of actual fraud, and that except for the terms of the will he would have been chargeable with a material part of the losses sustained. The opinion by Surrogate Foley stated: "The responsibility for the lamentable condition of this trust estate rests primarily upon the testator or the draftsman of his will." We may fairly then ask of the attorney for a prospective corporate fiduciary undertaking to draw a will whether he will so draft the clause defining the powers and responsibilities of the trustee as to protect the beneficiaries of the trust or his employer the fiduciary? It is seldom that the testator can be charged with responsibility for the language of a will, for the preparation of a will or trust agreement ordinarily is, as Judge Pound has said, "one of the most difficult tasks that a . . . lawyer is called on to perform." Clearly the true protection of a prospective testator or trustor is independent and unbiased advice from an attorney free of any embarrassment by reason of his relations to the prospective corporate fiduciary.[6]

[5] 121 Misc. 208, 200 N. Y. Supp. 777 (1923).

[6] See Opinion 10, AM. BAR ASS'N, OPINIONS OF COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES (1936) 61.

The necessity for maintaining these principles may be made more apparent by calling attention to a case notable for their non-observance. In *Jothann v. Irving Trust Company*,[7] the plaintiff, an unmarried woman with little business experience, was the owner of shares of stock in a Detroit bank having a value of about $200,000. She called upon a representative of the trust company whose duty it was to arrange for the creation of trusts and first discussed with the trust officer the making of a will. He asked her if she knew any lawyers in New York. On being informed that she did not, the trust officer recommended a firm, to whom he transmitted the plaintiff's wishes and instructions and who prepared her will for her. She never met these attorneys or any one from their office and never communicated with them directly. The will itself was executed in the office of the bank. In the preparation and execution of the will she relied entirely on the trust officer. After the will was drawn she again conferred with the trust officer in connection with the creation of an irrevocable trust. It appeared that she appreciated the dangers of speculation and wished to protect her prospective husband and certain close relatives, and for this purpose the holdings of the trust were to be diversified and the bank stocks which constituted her then fortune were to be sold to avoid the possibility of a double liability assessment. The trust officer represented to her that the stock which she then owned was not a suitable investment to be held in the trust and he submitted a list of investments which he thought could be purchased. She was told that if she deposited her Detroit bank stock with the defendant trust company it would sell the stock and reinvest the proceeds in diversified securities and mortgages of high grade and no investments were to be made in bank or in common stock. These details having been agreed upon, the trust officer undertook to have the trust agreement prepared. This was done by the same firm of attorneys who had previously prepared the plaintiff's will. Again she did not meet the attorneys and had no personal communication with them.

The court held that the instrument she signed was not in accord with the understanding she had arrived at with the trust officer; that she had agreed, and thought the instrument she signed so recited, that her bank stock was to be sold and the proceeds reinvested in diversified securities of the kind indicated; that the trust agreement, instead, permitted the trustee in its discretion to hold the entire bank stock as a trust investment and materially restricted the liability of the trustee in the event of loss; that this was not what the plainiff had bargained for, and the defendant knew it and these provisions could not be availed of as a defense. In directing that the agreement be reformed and an accounting had the court said:[8]

"To entitle the plaintiff to relief on this branch of the case it is not necessary to show that the conduct of the defendant was tainted by any evil design or that it involved moral obloquy. This is not a case where the parties dealt at arms' length. We have here a relationship of trust and confidence between the parties, a fiduciary relationship which with all its consequences was called into being not for the first time upon the execution

[7] 151 Misc. 107, 270 N. Y. Supp. 721 (1934). [8] *Id.* at 110, 270 N. Y. Supp. at 725.

of the agreement, but in the course of the negotiations leading to its preparation. In such a case the courts will grant relief where there is what has been graphically, if not accurately, termed 'constructive' fraud. A court of equity in effect says to a fiduciary: 'It is true that you have had no evil intention to do a wrongful act, but the consequences of your conduct would be so unfair, so unconscionable, that we will not permit you to take advantage of the dependence, the weakness of the one who relied upon you and who trusted you to protect and safeguard her interests. . . .

". . . Notwithstanding the forms which were followed, it must in all candor be said that the plaintiff actually received no independent legal advice in connection with the preparation or execution of the trust agreement in controversy. She did not have the benefit of independent counsel, devoted solely to her interests, in explaining the significance and the legal and practical effects of the instrument she signed. She was entitled to actual rather than absentee counsel and advice. Holden, an employee of the defendant, was in effect acting in a dual capacity, attempting to serve two principals with conflicting interests."

If lay control of lawyers were to be allowed, there can be no doubt that the practice of the law as an independent profession would come to an end, for members of the bar observing the standards of conduct required of them by tradition and by the canons of ethics can not compete with the solicitation, salesmanship and advertising of lay agencies. The inevitable development would be a group of specialists in lay employ. The collection agencies would hire lawyers to collect accounts and engage in commercial practice, corporate fiduciaries would hire lawyers to prepare wills and trust agreements and advise in the administration of estates, title companies would have a staff of lawyers to do conveyancing business and examine titles, adjusters would employ lawyers to specialize in the field of negligence law, credit associations would direct the activities of their lawyers in matters relating to insolvency. The New York Court of Appeals in *Matter of Cooperative Law Company*,[9] at least closed the indirect approach to such conditions. In that case a number of lawyers organized a corporation for the sole purpose of providing legal services of various kinds and through the means of the corporation procuring subscribers or clients. Although this occurred before an amendment to the New York Penal Law had made it a crime for corporations to practice law, the Court of Appeals held that it was fundamental in the law and in the administration of justice that corporations could not engage in the practice of law. In other words, that the character and special training required of lawyers can not be incorporated.

If the bar comes under lay control, then obviously lawyers must look forward to a complete change of status, and the question to be decided is whether or not such a change of status is in the interests of the public. At the present time and for generations past the privilege—not the right—to practice law has rested upon an expression of public policy by statute and by rule. It has been deemed necessary to the proper administration of justice that those seeking admission to the bar should be men of special training, of proven character and high standards of conduct. This is

[9] 198 N. Y. 479, 92 N. E. 15 (1910).

because the administration of justice is in the last analysis that part of the structure of government which is responsible for the maintenance of law and order, the preservation of property rights and personal security. If these standards, established as necessary by the state and accepted and approved by the bar, are requisite in our social order, then certainly laymen should not be allowed to break them down and statutes and rules establishing educational qualifications and ethical standards should be enforced.

As presently constituted the bar, in return for the special franchise granted it and for the special honor of being entrusted with the administration of justice, has undertaken many obligations of duty and service which class it as something other than a business enterprise, such as the duty to defend the poor when assigned for that purpose, to maintain the confidence and preserve inviolate the secrets of a client, to subordinate all personal consideration and at all times to be faithful to the trust imposed. As Mr. Justice Cardozo has said:

"'Membership in the bar is a privilege burdened with conditions'—The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the Court, and, like the Court itself, an instrument or agency to advance the ends of justice. His cooperation with the Court was due whenever justice would be imperilled if cooperation was withheld. He might be assigned as counsel for the needy, in causes criminal or civil, serving without pay. He might be directed by summary order to make restitution to a client of moneys or other property wrongfully withheld. He might be censured, suspended, or disbarred for 'any conduct prejudicial to the administration of Justice.'"[10]

Is it possible to conceive that this service and these duties can be properly rendered to the public by a lawyer in corporate employ or dependent upon a lay agency for the procurement of business? Obviously not. Mr. Root said in the course of an address to a body of students: "Admission to the Bar is not a mere license to carry on a trade but . . . it is an entrance into a profession with honorable traditions of service." No high sense of service to the public and no proper realization of duty to be performed can possibly exist on the part of a lawyer whose daily living depends upon satisfying, not the client to whom he owes his service, but the employer who gives him his pay check at the end of the month. Financial success is, of course, desirable, but the measure of true success comprehends something more than the results obtained for a particular client—for the results obtained and the methods employed in obtaining the results must not conflict with the obligations and ideals of the profession growing out of the requirements essential to a true administration of justice in the interests of all.

It is a necessary corollary of this that the bar faithfully discharge its responsibilities to the public. In 1910, Woodrow Wilson made the annual address to the American Bar Association. It was entitled: "The Lawyer and the Community." The address was a plea for individual independence and the maintenance by the profession of

[10] People *ex rel.* Karlin v. Culkin, 248 N. Y. 465, 470, 162 N. E. 487, 489 (1928).

the ideal of service not only to clients but even more to the state itself. He said, in part, to the members of the American Bar Association:

"You are not a mere body of expert business advisers in the field of civil law or a mere body of expert advocates for those who get entangled in the meshes of the criminal law. You are servants of the public, of the state itself. You are under bonds to serve the general interest, the integrity and enlightenment of law itself, in the advice you give individuals. It is your duty also to advise those who make the laws—to advise them in the general interest, with a view to the amelioration of every undesirable condition that the law can reach, the removal of every obstacle to progress and fair dealing that the law can remove, the lightening of every burden the law can lift and the righting of every wrong the law can rectify. The services of the lawyer are indispensable not only in the application of the accepted processes of the law, the interpretation of existing rules in the daily operations of life and business. His services are indispensable also in keeping, and in making, the law clear with regard to responsibility, to organization, to liability, and, above all, to the relation of private rights to the public interest."

In conclusion then it may be said that the existence of satisfactorily operating declarations of principles acceptable to the fiduciaries and the bar associations and the steady decrease in litigation between the two indicate not only a cordial relationship but also that the relationship rests on the sound foundation of recognition by each of their respective rights and of their duties to the public.

APPEARANCES BY LAYMEN IN A REPRESENTATIVE CAPACITY BEFORE ADMINISTRATIVE BODIES

WM. HEDGES ROBINSON, JR.*

One of the most controversial of the questions raised by the problem of unauthorized practice concerns the appearance by laymen in a representative capacity before boards, bureaus, commissions, and other quasi-judicial bodies, because the solution depends more upon factors which are embodied in the economic and social structure than upon any particular definition of what may or may not constitute the practice of law. The answers which have been given to the question have not afforded universal satisfaction, nor is the answer the same in all of the different jurisdictions. Public policy as defined by the legislature, as well as the socio-political opinion of a judge, has led to varying opinions.

To find a satisfactory solution requires an approach based upon a realization that the problem is not engendered by lawyers and practitioners—as I shall denominate the lay group—bickering over fees. This incidental feature, which may be so played upon as to seem the real issue, is an unfortunate offshoot. In reality, the solution requires coalition of three points of view: first, that of the public; second, that of the lawyer; and third, that of the practitioner. While the interest of the public must be considered of paramount importance, any answer which places undue emphasis upon any one of these points of view, or which ignores one, will probably prove unsatisfactory.

Therefore, an analysis which takes cognizance of all of these points of view should be made of the answers to this question. Three distinct answers have been offered: first, some states hold that any person may practice before any board or quasi-judical body.[1] This attitude proceeds upon a very limited construction of what constitutes the practice of law. Any board, department, bureau, or commission which is not a court in the strict sense is not a judicial body, according to these opinions, but a branch of the executive department. Hence, laymen may appear before these

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[1] North Dakota is probably such a state. There are no statutes forbidding such practice and the Supreme Court has taken a very restricted view of its powers over unauthorized practice of law. Murphy v. Townley, 274 N. W. 857 (N. D. 1937). In general, see cases collected in HICKS & KATZ, UNAUTHORIZED PRACTICE OF LAW (1934) 69, and BRAND, UNAUTHORIZED PRACTICE DECISIONS (1937) 783.

tribunals as "agents" or "attorneys in fact" for clients. These decisions overlook the accepted theory of administrative law that these bodies are part judicial in their nature. It should be pointed out, however, that in some instances these states have statutes which so define "practice of law" as to exclude therefrom appearances before administrative bodies, or which expressly authorize laymen to appear before the administrative board created by the statute.

This approach to the problem takes into account only the point of view of the practitioner. No safeguard is provided for the interest of the public. It permits untrained individuals bound by no code of ethics, and unhampered by any disciplinary supervision, to engage in the business of representing claimants. All of the evils of champerty, maintenance, and unethical practice may flourish without restraint. Any unscrupulous individual, any disbarred attorney, any ignoramus may be a practitioner under this doctrine, for there are no standards of ethics or of education, nor is any method of discipline provided. In addition to failing to protect the welfare of the public, this answer forces men who have spent years in formal training to acquire the skill to practice law to compete with individuals who may be utterly lacking in formal education or acceptable norms of conduct. Lawyers, who are unable to advertise or solicit business, are opposed by laymen who often actively solicit business in the broadest sense of the phrase. This is unfair competition of the worst kind and is decidedly an unhealthy condition not only for the bar, but for the public.

The public in the very early days of this nation was faced with the same problem in regard to lawyers, for admission to the bar was a mere formality. But as public rights began to receive recognition, it was seen that some curb must be placed upon the so-called rights of the individual. Hence, standards of education, conduct, and ethics were imposed upon those who desired to become lawyers, and these standards were continually raised; for it came to be recognized that the practice of the law was affected with a public interest and that it was both the right and the duty of the state to regulate and control it so that public welfare would be served and promoted.

Hence, this first answer should be disregarded by all concerned, for it is harmful to the public, unfair to the lawyer, and unsatisfactory to the qualified practitioner. The lesson taught by the revolts against the untrained lawyers in Colonial New England should be heeded by those practitioners who continue to urge that no restraint should be placed upon their practice. No system can survive built upon a foundation which is fundamentally opposed to the public welfare, nor can the first answer be accepted permanently even if attempts are made to have the various boards and bureaus prescribe individual standards of admission and ethics. Such a solution can at the most be only a makeshift one. The federal government has attempted this solution only to find that it has resulted in chaos.[2]

Since July 4, 1894, the United States Government has made some scattered and unrelated attempts to deal with this problem. It has a host of boards, bureaus, and

[2] See Robinson, *Lawyers and Practitioners: A Study in Contrasts* (1935) 21 A. B. A. J. 277, for a more detailed discussion of the federal situation.

commissions, each of which has its own special rules regarding the admission to practice before them. In general, they may be grouped into two main divisions. The first group, of which the Bureau of Pensions is a fair example, permits any person to practice before it if an application is made, an oath is taken, and a certificate as to character, reputation, and general fitness is furnished. The second group, of which the Board of Tax Appeals is outstanding, admits only licensed attorneys or qualified public accountants to practice before it. The first group of administrative bodies provides little, if any, method for disciplining its practitioners; and as a result, laymen, without any particular educational qualifications or training, and without any conception of ethics, run rampant. On the other hand, the second group has provided elaborate methods to discipline the practitioners. The Treasury Department, for example, lists numerous grounds for invoking disciplinary measures and provides for a hearing before established divisions within the department. Unfortunately, however, this elaborate machinery is seldom used. Disbarment from one commission or bureau of the federal government will not, moreover, disbar one from practice within other divisions of the same department, even less from other departments. It will thus be seen that the federal picture is even more chaotic and confusing than that existing in those states which have set the administrative bodies to drift as they pleased so far as regulations over admissions and discipline of the practitioners are concerned.

The second answer to our problem states that laymen may appear before the quasi-judicial tribunals only so long as their work does not involve the necessity for special legal skill and training. What may or may not constitute an encroachment is left for judicial definition in each case. Thus, in Pennsylvania, the court in the case of *Shortz v. Farrell*[3] permitted the practitioner to prepare and file pleadings in workmen's compensation cases, because the "pleadings" are "executed on forms prepared by the board, are elementary in character, and do not rise to the dignity of pleadings as that term is understood in other judicial proceedings." But this court expressly enjoined laymen from appearing before the referee in a representative capacity.

Under a recent Ohio decision, *Goodman v. Beall*,[4] laymen may prepare pleadings and appear in a representative capacity before the State Industrial Commission on the original hearing. However, "rehearing proceedings before the commission do constitute the practice of law and must be conducted exclusively and personally by an attorney or attorneys at law, duly admitted to practice." Under the Ohio statute, the record made at the rehearing becomes the basis for "an appeal" to the court of common pleas; and the decision of the court on this appeal is limited to the evidence submitted at the rehearing.

The answer proposed by this group of decisions is likewise unsatisfactory. It is open to the objections urged against the first answer, namely, that the interests of

[3] 327 Pa. 81, 193 Atl. 20 (1937).

[4] 130 Ohio St. 427, 200 N. E. 470 (1936); *cf.* State *ex rel.* Juergens v. Industrial Commission, 127 Ohio St. 524, 189 N. E. 445 (1934); Dunlap v. Lebus, 112 Ky. 237, 65 S. W. 441 (1901).

the public and lawyers are not protected due to the lack of standards of ethics and education. No control over the practitioner is left to the public. However, the answer is undoubtedly more fair to the lawyer for it separates certain functions from what may constitute the practice of law, permitting the practitioner to practice within the segregated sphere, while restricting him from invading certain defined preserves which constitute the practice of law.

But this answer creates an unsettled condition engendered by the uncertainty as to what particular sphere is open to the practitioner until there has been a judicial determination. In other words, a judicial decision is necessary to define what constitutes the practice of law in so far as every particular board, bureau, commission, or department is concerned, and these decisions may vary as much as the individual temperament of the judge deciding the case. It is no answer to say that the legislature in the creation of these administrative bodies can outline what constitutes the practice of law in each particular instance, for the courts have uniformly held that the judicial branch of government alone has the inherent right to determine what constitutes unauthorized practice and to control those admitted to the bar.[5] In addition, the same unstable level exists whether the legislature or judicial department of the government attempts to draw the boundary line. It is hardly an answer which can be accepted by the practitioner for he is left dangling in the realm of uncertainty as to what he may legitimately do and is given no protection from the unscrupulous acts of his associates.

There can be no doubt that a small minority of practitioners desire that certain very definite standards be imposed upon the group for they are aware that to permit any person to become a practitioner is injurious to those who are sincerely attempting to represent clients before administrative bodies in a professional manner. There also can be no doubt that a small group of practitioners are as well if not better trained and qualified to act before these quasi-judicial boards than are most lawyers. To deny the trained practitioner the right to appear often works an injustice to him and to those who would be his clients, and in the broad sense is not for the best interest of the public.

The third answer permits only lawyers to practice before the quasi-judicial bodies. This solution is apparently accepted in Illinois, Michigan, Missouri, and perhaps New York. The court in Illinois[6] found this answer by the following process of reasoning:

"Administrative law, although of comparatively recent growth, is recognized today as an important branch of the law. Classes for the study thereof are now taught in many of our leading law schools. Relatively speaking, not many years ago that part of a legal education was unknown to the curriculums of law colleges. In addition to the rigid educational requirements, the applicant must possess a good moral character. These prerequisites are not for the purpose of creating a monopoly in the legal profession nor for its

[5] See, *e. g.*, *In re* Opinion of the Justices, 289 Mass. 607, 194 N. E. 313 (1935).

[6] People *ex rel.* Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 353, 8 N. E. (2d) 941, 944 (1937); State Bar v. Waldron (Dist. Ct., Okla. 1935), BRAND, *op. cit. supra* note 1, at 442.

protection, but are for the better security of the people against incompetency and dishonesty."

"It is elementary that a great portion of the present-day practice of law is conducted outside the courtroom. The respondent urges that because the legislative act relating to the Industrial Commission grants to that body the right to promulgate rules governing the procedure before it, and the commission has adopted a rule permitting a party to appear before it by his attorney or "agent," he, as agent of the claimant, may lawfully appear before the commission as the representative of the client and try his claim there. Even though the Industrial Commission is merely an administrative body, yet, if what the respondent did for a fee, in the presentation of and hearing of a practitioner's claim before that body, amounted to the practice of law, a rule of the commission purporting to grant him that privilege is of no avail to him. The General Assembly has no authority to grant a layman the right to practice law. It follows that any rule adopted by the commission, purporting to bestow such privilege upon one not a duly licensed attorney at law, is void. Nor can the General Assembly lawfully declare not to be the practice of law, those activities the performance of which the judicial department may determine is the practice of law."

The Illinois court distinguishes the basis for its reasoning from *Goodman v. Beall*[7] on the ground of the particular statutes involved in each state, pointing out that the proceedings on rehearing in Ohio correspond with the allowance of claims by the commission on the original hearing in Illinois.

In Michigan, however, a circuit court has made no attempt to distinguish between any statutes which may be involved. In the case of *Michigan State Bar v. McGregor*,[8] decided in 1935, the court simply stated:

"It is urged that the Department of Labor is not a court but an administrative body and all acts done before it or in connection with it are outside the practice of law. True the Department of Labor and Industry is not a court. But the doctrine of *res adjudicata* applies to its proceedings and its decisions are binding upon all parties when not appealed from.

"It is a matter of common knowledge and a fact of which the court may take judicial notice, that the Department of Labor and Industry, acting through its commissioners sitting as a board, and through its deputy commissioners, holds hearings throughout the state which are conducted under well defined and printed rules; considers legal questions, applies legal principles and weighs facts under legal rules. Litigating parties appear before deputy commissioners and before the full board by attorneys almost as universally as they do in courts of record. Practice before this board is an extensive branch of the law business."

[7] *Supra* note 4. If the decision is actually based upon this ground, Illinois properly belongs in the second group. But the distinction between the statutes involved does not seem to be the true basis. If it is, then the dissenting opinion of Justice Shaw, which is based upon lack of inherent power of the court, would seem to arrive at the correct legal solution; for if the court has no power to regulate practice and to define it, then the matter must be left for statutory control.

[8] BRAND, *op. cit. supra* note 1, at 258; *cf.* Clark v. Austin, 101 S. W. (2d) 977 (Mo. 1937); Mandelbaum v. Gilbert & Barker Mfg. Co., 160 Misc. 656, 290 N. Y. Supp. 462 (1936); Elfenbein v. Luckenback Terminals, Inc., 111 N. J. L. 67, 166 Atl. 91 (1933). For a discussion based upon the Missouri case, see Howard, *Control of Unauthorized Practice before Administrative Tribunals in Missouri* (1937) 2 MO. L. REV. 313.

The Michigan court is not unmindful, however, of the fact that in some cases the practitioner may be better qualified to practice than the average lawyer. While the result reached in the particular case may not be the best so far as it pertained to this defendant, yet the court properly felt itself without the power to give any decision which would differentiate between the abilities and qualifications of the practitioners.

The answer given by this third group is not entirely acceptable. It unduly protects the lawyers as against the practitioners, and fails to recognize that in the field of administrative law a practitioner may more effectively and ably deal with the problems than a lawyer. Therefore, the interest of the public is served in part and denied in part by this solution.

Consequently, it would seem best to disregard all of these answers. They all have certain fundamental objections which cannot be eradicated by legislative meddling or judical tinkering. The approach to a solution should be based upon a recognition that administrative law is definitely grafted onto present governmental structures, and that it fulfills a need which the courts at present are neither equipped nor trained to satisfy. Since these administrative bodies are an accepted part of government, it is certain that they will within a few years acquire a formality which is now lacking to a large extent and that untrained litigants will be forced to demand representation before them. Practitioners are then inevitable. Merely because of this fact, it is not wise to open wide the portals to all who desire to act in a representative capacity, nor to attempt to apply exactly the same requirements to these practitioners which are now applied to lawyers.

While it is true that the enormous development in recent years of administrative boards and tribunals has made for haphazard and arbitrary rules, yet there is no reason to apply to these bodies the identical principles and philosophy which have been applied to the courts, for if that is to be, administrative law loses its effectiveness and would better be administered by the law courts. So, too, it would be unwise to apply exactly the same standards to the practitioners as to the lawyers. No doubt a uniform standard of ethics can well be adopted by both groups; but an attempt to apply exactly the same training to the practitioner as required of the lawyer, or to demand that the lawyer be trained as a practitioner should be trained will result in wasted effort.

It would seem that the ultimate solution of this troublesome question requires more than an attempt to formulate an all-inclusive definition of what constitutes the practice of law. It requires a complete overhauling of that Gargantuan growth which has been termed administrative law. New concepts, an effort for co-ordination, a period of readjustment are among those things which are vitally needed to work out this problem.

The only feasible solution yet to be advanced pertains to the federal government, but it is easily adaptable to the state governments. The plan provides that the quasi-judicial bodies be consolidated into an administrative tribunal divided into depart-

ments.[9] The judges of this court would be composed of the experts who are the heads of the now unrelated and uncoordinated administrative bodies. Uniform rules of practice and procedure would exist before all of the various departments of the tribunal.

With the consolidation of these various boards, bureaus, and commissions would come uniform standards for the practitioners. Definite rules for admission to practice and a code of ethics could be promulgated. The inevitable result would be the creation of a practitioners' bar as a recognized branch of the judicial department. This bar would require certain educational standards. These standards might differ radically from those required of the lawyers. More emphasis would no doubt be placed upon technical training in such fields as engineering, accounting, corporate finance, and labor, employer relationships, and less emphasis, or none at all, upon some subjects now studied in law schools such as real property and equity. Yet a certain degree of formal education would be required before application for admission to practice would be accepted.

The educational training for the practitioner would be based on the principles underlying administrative law. It would recognize the need for training in such specialized subjects as have heretofore been believed to be outside the formal education required of a lawyer. The present approach of law schools relating to adjective law would have to be entirely revamped. Our present system of legal education in this field is in many places arbitrary to the point of being despotic, unreasonable to the point of being faintly humorous, and hopelessly out of keeping with the solution of modern problems. The emphasis of the training of the practitioner would be less on the previous rules of evidence, and more upon the development of a practical method of placing all facts before a tribunal in a quick and efficient method. Thus, the education of the practitioner and lawyer would differ greatly—not that the practitioner should be any less trained in his field than the lawyer now is in his; merely that the type of training would be different. The code of ethics naturally would be the same for the lawyer and practitioner, and both could be subject to the same disciplinary machinery.

For all purposes it would seem that the best practical method of correlating the two proposed groups would be to create a bar with two divisions—perhaps three. One division would be for the practitioners, members of which would be limited to practice before the administrative court. The second division would embrace the lawyers practicing before the law and equity courts. A third division (not essential but possible) might be created, open to lawyers of prescribed experience, for practice in the appellate courts on appeals from the administrative, and law and equity courts.

How could this bar be created? The problem is not weighty from a mechanical aspect, although from the standpoint of human relationships it may require considerable time and a vast amount of social adjustment before it can be accomplished. To the writer it seems to comprehend, first of all, a unified court system. This means

[9] 61 AM. BAR ASS'N REP. (1936) 720. But see AM. BAR ASS'N, ADVANCE PROGRAM (1937) 165 at 184.

that the outlined administrative tribunal must be created, and that all courts, including the administrative court, must be made a part of a unified system, supervised and controlled by a supreme court. It also requires a complete reorganization of the bar with provisions made for the divisions suggested above. Probably some form of an integrated or federalized bar association would be a necessary concomitant of this plan of reorganization.

The ideal plan, of course, would be to make a clean-cut two-fold reorganization of the judicial branch of the government, involving the creation of the bar, and of the unified court system. While, because of considerations of "practical politics," it is perhaps impossible to make such a change immediately, yet it would be wise, it seems, for all concerned to urge it lest the bar find itself in the position of the medical societies with their battles between the "old school" and "new school" doctors. The example of the men of medicine squabbling over fields of practice and rights therein should be thoroughly considered by the lawyer and practitioner, for that very sort of thing looms upon our horizons.

As a practical method of evolution, it might be wise to begin by first creating at least a semi-professional group known as practitioners, with the ideal of leading ultimately to the status of a professional body as suggested. As for the court reform, it is a measure that is needed in itself in many states; and, while it is a part of the proposal, steps to bring it about need not wait on the creation of the administrative tribunal. Nor is there any necessity of holding back on either of these proposals until the setting up of a practitioner's bar. A material advance on any of these fronts should bring that much nearer the solution of the problem under consideration.

THE EFFECT OF UNAUTHORIZED PRACTICE OF LAW UPON THE ETHICS OF THE LEGAL PROFESSION

BOYLE G. CLARK*

An appreciation of the effect of unauthorized practice of law upon professional ethics and the administration of justice requires an understanding of the instruments and processes by which justice is administered and the functions of a licensed bar in the judicial system. Only by first visualizing the entire system engaged in the administration of justice and the place of the legal profession therein, can one determine fully the consequence of unauthorized practice.

Under the American system of constitutional government, ultimate responsibility for the administration of justice rests upon the judiciary. However, this does not mean either that the administration of justice is limited to formal proceedings in court or that the judges alone bear the burden of determining and protecting the rights of the public. As a matter of fact, formal litigation is but one of the many processes provided for the protection and determination of legal rights. The bar is maintained as an agency of the courts to assist in the administration of justice both within and without the courtroom. The members of the bar are officers of the court without whom the courts cannot function, and without whom the courts would be powerless to discharge their obligation to see that justice is administered fairly not only in the courtroom, but in the field outside the direct supervision of the courts, where the greatest opportunity for miscarriage exists. It is as much the concern of the courts when the administration of justice is thwarted by dishonesty, ignorance, and lack of access to the courts as when the same result is reached by perjury, or tampering with a jury in formal proceedings. To insure to the public adequate protection from dishonesty and incompetence in the pursuit of justice, membership in the bar is limited to those who have proven themselves to be of superior learning and character. To maintain standards of superior ability and conduct the members of the bar are required to conform to a higher standard of conduct than that required of every man.

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The standards of conduct required of the members of the bar, and which are so necessary to an even administration of justice, are expressed in the canons of professional ethics. By them the lawyer is required to place his duty to the public and the court above that of private gain. He must cooperate with the courts in administering justice, though it be to his personal detriment and possibly to the detriment of his client. He may be required, without remuneration, to serve as counsel for the indigent in civil or criminal cases where justice would be imperiled, were his cooperation withheld. In the interest of affording free access to the instruments of the administration of justice, he is required by law to preserve the confidence of his client. To avoid the maintenance of costly, unseemly and unnecessary strife he is required to refrain from soliciting or stirring up controversies, even though he might personally profit thereby. To avoid the opportunity for traitorous conduct he must forego the representation of conflicting interests. To prevent the use of his skill, learning and position for immoral purposes, his highest responsibility, above that to his client, is to the courts and to the public. To prevent the commercialization of his office and the exploitation of the processes of justice for profit, he is forbidden to divide his compensation with or lend his services to intermediaries and practice brokers. To insure the faithful performance of these trusts, he is amenable to summary discipline or disbarment. As said by Mr. Justice Cardozo, "Membership in the bar is a privilege burdened with conditions."[1] It is these conditions which make the bar useful in dispensing justice, and distinguish the profession of the law from a trade or business. If these conditions are not complied with, justice is imperiled and the public guarantees are lost.

The Supreme Court of Missouri has recognized the relation of unauthorized practice of law and professional ethics, in its rules creating the Missouri Bar Administration.[2] The Bar Committees of Missouri are charged with the enforcement of the Canons of Professional Ethics and the suppression of the unauthorized practice of law. In *Curry v. Dahlberg*, the Missouri Supreme Court announced its policy in this respect, saying:[3]

"This court believes that it has the responsibility and the duty to concern itself both with regard to proper conduct of licensed practitioners and with unlawful practice of law by all others to the end that legal services required by the public, and essential to the administration of justice, will be rendered by those who have been found by investigation to be properly prepared to do so by conforming to strict educational standards, and who demonstrate that they have the character to conform to higher standards of ethical conduct than are ordinarily considered necessary in business relations which do not involve the same fiduciary and confidential relationships. To enforce such standards of ability, knowledge and conduct, it is necessary in the public interest to prevent those who will not or

[1] People *ex rel.* Karlin v. Culkin, 248 N. Y. 465, 470, 162 N. E. 487, 489 (1928).

[2] The Missouri Bar is partially integrated by judicial rule. See Clark, *Missouri's Accomplishments and Program for Eliminating the Unlawful Practice of the Law* (1936) 22 A. B. A. J. 9.

[3] The quotation is from the opinion denying a motion for rehearing which has not yet been reported. The court, sitting *en banc*, adopted the opinion of the divisional judge set forth in 110 S. W. (2d) 742 (1937) as the opinion of the court.

cannot comply with them from engaging in competition for legal work with those who must and do observe them, especially when as here, such employment is obtained by advertising and soliciting rather than by being sought out because of known integrity and ability."

In this setting it is easy to determine the effect of unauthorized practice of law upon professional ethics in the functioning of the judicial processes.

"Unauthorized practice of law," as we use the term, includes not only performance by an unlicensed person, of acts which constitute the practice of law, but also the directly related conduct of intermediaries and practice brokers engaged in controlling the flow of professional employment for profit and, as middlemen, selling the services of lawyers.

With respect to the performance of professional services by laymen or corporations, it is immediately evident that the public and the administration of justice are injuriously affected. The unauthorized practitioner recognizes no obligation to the courts or to the public. His sole object is personal gain. Absent are the guarantees of superior skill, learning and character when he is employed. Likewise absent is the deterrent against dishonesty, disloyalty, and perversion of the laws present in the existence and enforcement of the code of professional ethics when the lawyer acts. Solicitation and salesmanship dictate the flow of employment rather than integrity and ability. The administration of justice is placed in the hands of the usurper, and the corporate entity responsible to its stockholders only. The enforcible morals of the commercial practitioner of law are the enforcible criminal laws. So in this case the administration of justice and the public interest are subordinated to the pursuit of the dollar.

The demoralizing effect of the unauthorized practice of law upon the adherence by the bar to its code of ethics is no longer subject to dispute. The results which have been produced are a matter of history, susceptible of proof. Furthermore the field of demoralization is continually widening as the unauthorized practitioners extend the scope of their operations.

The unethical conduct of lawyers which has been occasioned by the unauthorized practitioner can be roughly divided into three general classes: (1) misconduct caused by competition of the unauthorized practitioner, (2) misconduct caused by dependency upon the unauthorized practitioner, (3) misconduct caused by the example of the unauthorized practitioner.

Solicitation by advertising for professional employment is condemned by the canons of ethics of the legal profession. This conduct is condemned because it injuriously affects the public interest and the administration of justice. If the public interest is to be served professional employment should be based upon known integrity, skill and ability, rather than industrious solicitation and advertising. To prevent an unseemly scramble for professional employment among the members of the bar, the rule against solicitation and advertising was evolved. This rule works

well so long as those unlicensed are forbidden to compete with the lawyer in the rendition of legal services.

However, the unauthorized practitioner has taken advantage of the professional restraint against solicitation and advertising and proceeded to divert from the members of the bar a large portion of the legal practice. By his code of ethics, the lawyer is forbidden to protect his field of employment. Nevertheless all lawyers are not willing to give up their field without a fight. Consequently, a considerable part of the bar, preferring to remain independent of the control of the unauthorized practitioner, meets solicitation with solicitation, advertising with advertising, practice garnering devices with practice garnering devices. The independent insurance adjustment agency for the insurer finds itself arrayed against the lawyer-devised and controlled claimants' adjustment agency. The claim agent begins to meet the lawyer's runner at the bedside of the injured. Judicial notice of this development was taken by a dissenting judge in the Wisconsin case of *Rubin v. State:*[4]

"This often resulted in claim agents of the corporations following the injured person to the bedside and wrongfully imposing upon him. To overcome this advantage of the large industrial concerns, some lawyers found it to their advantage and the advantage of their clients to meet the claim agent on his own ground."

And so the competition rages between the lawyer who is not content to see his practice stolen by outlaws, and the unauthorized practitioner who finds the practice of law a lucrative and easily entered field. The public, interested in securing a fair and dignified administration of justice and a high quality of legal services, suffers most from this competition.

An even more reprehensible class of misconduct by members of the bar has been engendered by the practices of the unauthorized practitioner. The racketeering law list, the practice broker, the illegal collection agency, the automobile service association, the independent adjuster, the corporate practitioner of the law, have, by securing control of the flow of professional employment, destroyed the independence of the lawyers with whom they deal. These intermediaries have attained a degree of control over the legal profession that minimizes the authority of the courts. This control is based upon the ability to exert upon the lawyer economic pressure and thereby force obedience.

To be specific, the racketeering selected law list solicits large blocks of legal practice. This it practically sells at auction to the member of the bar willing to pay the highest price.[5] It induces further gross breaches of the canons of ethics on the

[4] 194 Wisc. 207, 216, at 226, 216 N. W. 513, 517, at 521 (1927).

[5] The Missouri investigation of the conduct of law lists disclosed the following facts (among others): That the price charged for representation in "selected lists" was based upon the amount of professional employment produced by the list for the individual listee. That this price was many times the cost of publication plus a good profit to the publisher. That the "selected list" publishers generally attempt to keep a record of items forwarded to the subscriber lawyer over the list and to fix the fee for list representation upon the basis of professional employment produced. That the "selected lists" by initiating an unseemly scramble among lawyers for list representation, by engaging in the barter, sale, and auction of professional employment induce gross breaches in the Canons of Ethics, commercialize the practice of law,

part of lawyers by maintaining private disciplinary agencies which dictate to the lawyer what business he shall handle and how he shall handle it. In many cases the law lists require the lawyers receiving their business to conduct themselves in a manner contrary to the letter and spirit of the lawyer's code of ethics. Instead of an officer of the court, a lawyer becomes an agent and subject of the unlicensed commercial intermediary.

The same situation obtains in the case of the independent adjustment agency, and the automobile service association, both of which are corporate practitioners of law. In some cases the dependency is direct and the lawyer is merely an employee whose service is being sold by his employer, as a middleman. In other cases the dependency is indirect and the lawyer, though ostensibly an independent practitioner, is in truth but the supplicant beneficiary of the interests that control the course of his professional employment. Dominance of the bar by those who possess a commercial viewpoint produces a conflict between the morals of the market place and the idealistic code of professional ethics. The lawyer no longer chooses the cases which he will bring or determines the manner of their presentation. The lawyer no longer is able to refuse to descend to the practices which breed the miscarriage of justice, nor to follow the dictates of his professional conscience, but lives by the conscience of his commercial mentor. And there is yet to be found the unauthorized practitioner who recognizes the lawyer's duty as expressed in Canon 32.[6] All this flows from the human susceptibility to economic pressure. While it may be untrue that the love of money is the root of all evil, it must be admitted that the need of money is the root of much evil.

Finally, there is another class of misconduct caused by the example set by the unauthorized practitioner. Members of the bar, observing the scene, discover the wealth which may be gained by exploiting the administration of justice. They ob-

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demoralize the field of practice invaded, and create an example which lowers the standard of professional conduct in other fields. That the "selected lists" and their allied intermediaries not only solicit legal practice, but purchase and sell between themselves the control of blocks of items to be forwarded in the furtherance of their agreement to "deliver the goods" to their lawyer subscribers. It is the subscribing lawyer who actually finances these operations.

These facts were developed in the Missouri hearing from the testimony of law list publishers and subscribers alone. The record is filed in the Supreme Court of Missouri, and is available for public inspection.

[6] CANON 32. THE LAWYER'S DUTY IN ITS LAST ANALYSIS. "No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen."

serve that the public is not quick to become inflamed at commercialization of the practice of law. They learn that undivided loyalty to the courts is *not* advantageous from a pecuniary standpoint. A professional conscience is suddenly made to appear to be a liability rather than an asset. Under these circumstances it is not strange that a countless number of lawyers yield to the temptation of commercialization, debase their calling and descend to the practices of the unauthorized practitioner, contrary to their own code of ethics.

Commercialization of the bar, loss of the lawyer's independence and lowering of the standards of conduct so loudly bewailed and lamented at bar association meetings has a definite origin.

Cognizance of these conditions was taken by the Supreme Court of Rhode Island. In *Rhode Island Bar Association v. Automobile Service Association* the court said:[7]

"Under our system of law the most effective guaranty of equal justice to all in the commonwealth is a competent and learned bar composed of men of high personal character who govern their professional conduct at all times by the well-known and generally accepted canons of legal ethics. The lack of such a bar, or the coexistence with it of an array of individuals or groups operating under deceptive devices and catch names to mislead the public into the belief that they are intrusting their causes to those learned in the law and competent to serve them, would inevitably result in a deprivation of justice to many in the state. *In such an atmosphere, there would be a strong tendency for the bar to sink to the level of its unauthorized and unqualified competitors.* (Italics added.)

"It is our duty to prevent this unfortunate and evil event whenever it threatens. This court is the agent of the people in the administration of justice in this state and has been vested with ample powers to vindicate its authority in this department of the people's government. It would be recreant to the great trust reposed in it if it did not guard every agency by which justice is administered. To safeguard the practice of the law, which touches so intimately the administration of justice, and to promote the welfare of the people, whose ministers we are, this court has ordained certain standards of character and education as a prerequisite to admission to the bar. These standards are high, as indeed they ought to be, and there is constant pressure to elevate them still higher, all to the end that the people may be assured the best possible service in the dispatch of their legal business."

Daily, in our disciplinary work in Missouri, we find evidence of the demoralizing effect of the unauthorized practice upon the bar.[8] And the statements made here are

[7] 53 R. I. 122, at 138, 179 Atl. 139, at 146 (1935).

[8] Upon promulgation by the Supreme Court of Missouri of the rules creating the Missouri Bar Administration, we conceived it to be our primary duty to enforce the rules of professional conduct. Before undertaking the suppression of the unauthorized practice of law, a vigorous disciplinary campaign was instituted and is being prosecuted at this time. In the three years under the rules, forty-eight disciplinary actions have been instituted against members of the Missouri Bar. In eleven of these cases disbarment was finally ordered. One was dismissed by the court; fifteen suspensions were ordered; two offenders were punished by reprimand administered in open court. Three actions are pending upon reports of the commissioners hearing them; in these three cases, disbarment has been recommended by the commissioner. The remaining sixteen of these actions are pending. Some have been tried and submitted to the commissioner or court and others are coming up for trial in the usual course.

These figures represent only actions instituted in courts of record after preliminary hearings before the Committees. A large number of complaints have been received by the Committees and investigated

not theories or imagination but the relation of facts which have been judicially found by the bar administration of Missouri. Specific examples abound. It is no longer a question of what the conditions are. The question confronting the public today is what is being done about it. In Missouri we have cleaned our own house and are now engaged in abolishing the unauthorized practitioner. So far we have been successful and are determined to finish the work. We hope never to see the day when the practice of law is again transformed from a profession into a business.

Criminal, dishonest service, is never cheap, no matter what the ostensible price. Justice cannot be bought and sold. It can be secured only through competent, loyal public officers of the highest character. If the unauthorized practitioner is not suppressed, the judiciary will find itself unable to command its own officers, and unable to discharge its constitutional obligations to provide for the administration of justice.

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privately. Some of these complaints are still pending before the Committees, others have been dismissed for lack of merit.

A good percentage of the twenty-nine cases finally terminated were disposed of by written opinion of one of the appellate courts of Missouri. Anyone interested in the work of the Missouri Bar Administration may find these opinions in the Missouri Reports and the Southwestern Reporter for the years 1935-1938.

No program for the suppression of the unauthorized practice of law will be well received unless the Bar first makes an honest endeavor to clean its own house. This cardinal principle constitutes an essential feature of the Missouri Plan.

THE BAR'S TROUBLES, AND POULTICES — AND CURES?*

K. N. LLEWELLYN†

The problem of unauthorized practice of the law is a problem of using the processes of the law to define and protect a monopoly. It immediately raises a series of obvious questions: What are the precise subject-matters of the proposed monopoly? Or, where statutes have already been passed recapturing invaded areas or pushing the monopoly into non-traditional salients, what are the precise subject-matters of the actual legally protected monopoly?

Then: Why does our society need to entrust *any* of these subject-matters, examined one by one, to a monopoly? What is gained thereby for anyone but the monopolist? Is he for example so much better equipped to do this particular work than anyone else that it pays to keep all others out? Or is this job so important to the public that minimum qualifications for embarking on it need public testing and certification?

* The American Bar Association has a Committee on Legal Aid Work, one on the Economic Condition of the Bar, one on Professional Ethics and Grievances, one on Unauthorized Practice, one on Legal Clinics, a section devoted to Legal Education and Admissions, a section devoted to Bar Organization and a Committee thereof on Coordination, and another on Public Relations. It is almost sure, shortly, to have one on Surveys of the Bar and of Legal Business. This paper attempts to make explicit some of what the Committees at work are discovering to vitally condition their work: to wit, that all such phases of the Problem of the Bar have a common line of cause, a common focus, a common line of cure. No less a part of the same picture is post-graduate education, on which see articles by Shafroth in 23 A. B. A. J. 777 (1937); 24 *id.* 11 (1938); and on which there is also a Committee.

An attempted sketch of the Whole must leave innumerable parts untouched, or suggested in a single sentence. It must risk unproved and locally inapplicable generalization. It must leave unnoted most of the documentation which exists. Its aim is perspective. It can hope to stimulate investigation—investigation seriously and carefully undertaken, with no light-hearted notion that finding facts is an off-hour job—investigation to determine whether the seeming general conclusions hold for any particular Bar, or any recognizable part of any particular Bar. If either gain in perspective or furtherance of real investigation is achieved, this paper has done all that it hopes to do.

The ideas involved are becoming common ground among the more careful thinkers in the field. My indebtedness to many of them I repeat: R. H. Smith, J. S. Bradway, R. Moley, Gisnet, A. A. Berle, P. J. Wickser, E. Cheatham, J. Michael (See my *The Bar Specializes* (1933) 167 ANNALS 177). Add I. Lazarus, C. E. Clark, L. K. Garrison, W. Rutledge, D. F. Cavers, F. Shea—and Emma Corstvet's singularly dispassionate and uncomfortable probing into which of the "known facts" are either fact, or if fact, are known; and into what the known facts *really* show, or do *not* suffice to show.

Some of the most recent available and at least moderately significant fact material and analyses of the underlying conditions may be better cited: Lazarus, *The Economic Crisis in The Legal Profession*, 1 NA-

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Or is it, as an administrative matter, perhaps necessary to add this or some other revenue-producing job (say notarization) to the monopoly subject-matters simply in order to support monopolists whose revenue from jobs for which we definitely need them will not alone eke out their existence?

Thirdly, why should these particular monopolists be given by law the monopoly-privilege?—again canvassing the subject-matters one by one. Is their service-record satisfactory? Are their charges reasonable? Do they serve all comers well and equally, and reliably, irrespective of person or pocketbook or position?

Fourthly: Who is worrying about unauthorized practice, and why? Is it the public, complaining of quacks? Is it the profession, concerned about the public welfare? Or who, and why? And do the proposed remedies fit the complaints made?

Such are the questions which underlie any discussion of unauthorized practice of the law, and any position taken on unauthorized practice of the law by anybody will either tacitly assume or openly posit as its base-lines some answers to such questions. *Any* position taken *must* do so.

The lines of my own approach to these underlying matters had therefore better be set out before I proceed.

AN AUTHOR'S APPROACH STATED

First, in a time of worry and crisis about anything the traditional ways of doing and thinking about that thing are on trial, even when tradition is unambiguous. But

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TIONAL LAWYERS GUILD QUARTERLY 17 (December 1937) (reviewing the N. Y. City survey of lawyers); Committee for Cooperation between the Law Schools and the State Bar of California, *The Economic and Professional Status of California Lawyers during the First Five Years of Practice* (1937) 12 STATE BAR J. (Calif.) 259; Garrison, *A Survey of the Wisconsin Bar* (1935) 10 WIS. L. REV. 131; Stephens, *The Experienced Lawyers' Service* (1934) 23 ILL. BAR J. 5, also *id.* at 216; Brenner, *Survey of Employment Conditions among Young Attorneys in California* (1932) 12 STATE BAR J. (Calif.) 314; Am. Ass'n of Law Schools, *Report of Committee on Cooperation with the Bench and Bar* (Rutledge, Ch.) Program (1937) 42. Chicago Chapter, National Lawyers' Guild, *Report of Committee on Legal Service Bureaus* (1937). *Forthcoming*, with contents which I have in part either seen or heard discussed: American Bar Association, *Report of Committee on Economic Condition of the Bar*, 1938 (and see their Report for 1937, AM. BAR ASS'N, ADVANCE PROGRAM (1937) 247); *Report of Committee on Legal Clinics*, 1938; C. E. Clark and E. Corstvet, *Techniques for Exploring The Bar's Relation to The Community's Legal Needs: the Connecticut Study*. (Title subject to change); Am. Ass'n of Law Schools, Committee on Cooperation with Bench and Bar: *Manual for Objective Determination of The Bar's Economic Condition and the Bar's Relation to the Community's Needs for Legal Service*. (Title subject to change); Symposium in *Illinois Law Review* for February, 1938.

One hears, meanwhile, of projected studies in New Jersey and New York. Others must be in process. The hard thing is to keep the set-up of any study from either pre-determining questions, or from leaving questions ambiguous or even multiguous, or from relying on answers which cannot be wholly trusted to represent fact. *Figures* mean nothing *unless the stuff which makes up the figures* can be relied on. *E. g.*: Who knows how many lawyers are in practice, as lawyers, anywhere? No figures I have seen, with the possible exception of Garrison's Wisconsin study, give me any light on that, at all.

Does the Bar have to become a statistician? I fear even worse than that. I fear that the Bar may have to find folk among its members who can deal with *silly* statisticians as they have long done with silly "expert" witnesses generally, and who then look into the real meaning of the evidence. I have argued on p. 114 that the Bar is here the Bar's own client. A lawyer, in such a situation, masters the relevant extra-lawyer techniques, in the interests of his immediate client. He masters the techniques two different ways: first, to understand and build his own case; second, to understand the weaknesses in his opponent's. What he does *not* do, is to shun study, or to lose understanding in anticipatory advocacy.

today, this area of what is claimed to be unauthorized practice is one in which tradition speaks either with a forked tongue or not at all. Either the particular job in question has, by pure social growth, come to be performed *both* by lawyers *and* by others, (say notary's work or collections) or the job in question is a new job with very little tradition, open to occupancy by either lawyers or others (say income-tax counselling or representation before a labor board). Tradition therefore either of what has been or of what has not been regarded as the lawyer's exclusive prerogative (or as the lawyer's proper outside limits of action) affords no decisive answer to any demarcation of the field.

Second, mediation between the powerful Law and Legal Institutions which speak in the name of All-of-Us-at-Once and any lesser group of us, corporate, unincorporate or family—or even the occasional surviving lone individual—this I regard as an expert job, a necessary job, a permanent job. This equally whether the mediation take the form of advocacy or of counselling or of negotiation. It will always take skill to put a case well; specialization in that is a good thing to have, and it is well for the mouth-piece to be certified as competent. It will always take skill to steer away from dismissal of the complaint, to skirt the shoals of summary judgment, or to get the lines of sound appeal fitted to the procedure of the moment—or even to locate the effective office door among mazy administrative corridors. It will always take skill to tell a man in advance what action he may or can take, and show him how to take it, so as to have Law and Legal Institutions either neutral or active in his behalf. All these and others are matters in which a client's interests are invested in legal counsel. Other matters a-plenty occur in which the same holds true: investment counsel, insurance counsel, the friend who advises for or against that girl, or on whether to take that job, or on what surgeon or lawyer to consult. On such other matters skill is needed, too, and the need is permanent, too, and specialized and disinterested advice is most desirable. Perhaps the trouble there is that specialization has not developed far enough to enable us to organize a system of testing and certification.

Yet even with regard to the skills and tasks which have traditionally been entrusted to the lawyer one cannot wisely take as a base-line that as of course his monopoly must *or can* continue. The putting of a case, the negotiation of a settlement, the conduct of a trial of fact, representation before a tribunal or an administrator, to say nothing of debt collection or the handling of a trust fund—such "lawyer's" jobs I have found again and again done in workmanlike fashion by laymen, wholly unlearned in the law, who simply had specialized in the particular job in question. Again and again I have seen each of them poorly done by lawyers. And many "lawyer's jobs," such as the conduct of a case before a labor mediator, I have seen counsel almost regularly handle less skilfully than his principal, on either side. Such facts of course settle nothing. They do give to think: If laymen can do certain jobs as well as lawyers, or better, can they be kept out at all, or permanently, by legislation? Lawyers are not too popular as things stand, though they do have so heavy a repre-

sentation in the legislatures. It is well to remember that man has seen not only legislation for lawyers' monopoly, but also legislation *throwing lawyers out* even of handling litigation before various specialized tribunals.[1] If laymen can do some jobs better or more cheaply and rapidly than lawyers, and they are specialized jobs, with articulate interests behind them, can a lawyer's monopoly—by law—stand up? Again, if there are some jobs, some central jobs, for which lawyers can with some safety be regarded as better equipped than any but exceptional laymen, and there are others where law-skills and lay-skills overlap, is a monopoly of more than the central jobs a wise one, a useful one, or one possible to be maintained? Yet again, if there be specialized jobs which require testing and certification for public protection, but in which law-skill is not the essential, is the public better served by lawyer's monopoly, or by allowing C.P.A.'s along with lawyers to counsel on tax matters, or approved technical experts, along with lawyers, to deal with patent matters? There are two base-lines in such matters: the public *will* be served; though the lawyer must be, as well. Two base-lines, not one.[2]

That is, if we can get the lawyer's central jobs performed, under any such conditions. Which brings me to my third main base-line, which is that no discussion of unauthorized practice can lead to really intelligent action until unauthorized practice is thought of not alone, but in conjunction with the economic condition of the Bar; with Bar organization and activities; with the well-done, ill-done and undone legal business of the community; and with admission requirements and quotas. Unauthorized practice problems, in terms of what to *do* about them in general, are inextricably interwoven with these other questions, to form a single pattern. The threads, one by one, are not only almost meaningless but are misleading unless

[1] Juvenile courts; many small claims courts; under the German Republic all labor courts, even on highest appeal; and in each case with results dismayingly satisfactory to the parties. In the small claims courts the theory is that the cases are simple, and that the recovery is too small to pay a fee. In the other two cases the goal was adjustment, which the advocate's over-partisan training hindered. In mediation and arbitration the cases of parties inarticulate or so bitter that they need to talk through an outsider seem to about equal those in which the lawyer bothers the case by his over-technicality, claim-puffing, and one-sided approach. *This last is not inherent in the lawyer.* There was a time when A and B, having agreed, agreed also to go down to Lawyer Jones to have the thing drawn up. Lawyer Jones then counselled *both*—a function as useful as, today, it seems queer.

[2] Moreover, if the drive of the times is what I believe it to be, these base-lines are coming into critical conjunction. First, to a degree which distresses, in the main, rather more than elsewhere, in the larger city the pressure for fees is tending to disrupt any clear coordination of interest between the lawyer and most of his clients. Frequent results run all the way from practical hijacking through mere overcharge into distortion of the lawyer's own judgment in advising and into the occasional ruination of a case by fuss-budgeting activity to justify a fee. In such circumstances monopoly carries with it portent of abuse. *Such abuse need not be general,* in order to garrote the Bar. Indeed, as clients get together in groups, they acquire less of a black-art approach, more of a show-me-results approach to matters legal; and acquire also enough repetitive experience in particular lines of matter to form their own judgments about what good law work is. The mark of this in business is the formation of a legal department which proceeds to handle one business unit's legal work on business principles. The mark of it in the accident field is the Automobile Owners' Ass'n. These are a beginning, only.

Lawyers are going, then to *have* to SERVE, or lose monopoly. And that is a prospect which every right lawyer will be glad to see moving out of the field of preaching into the field of professional necessity. He does not—*if* his Bar locks shields, in a fashion equally Roman and Icelandic—have any fear of net results.

examined in relation to the whole. This paper attempts a preliminary canvass of that whole and of the relation of its various parts. Details will of necessity be faulty. The generalizations will of course be inapplicable to many areas of the land or of the practice. The major emphasis here is on metropolitan conditions; the thesis is that these show in extreme and risingly crucial form maladjustments which have been making themselves felt in lesser but increasing degree most of the country over; and which, unless something is done about it *skilfully*, and along coordinated and sustained lines, will grow worse instead of better.

Lastly, let me make certain things as clear as words can make them, as to the presuppositions and objectives of this inquiry. I am a lawyer, and a teacher of law. I am proud of the profession. I am jealous for its standing and its growth. I believe in it. Nothing that I have to say *is* in fact, or is *intended* as, or can *fairly be read* as, an attack or an accusation or an Utterance of Grievance. The attempt here is single: to *describe a situation:* its What, its Why, its Whither. Since, like my brethren, I fail to enjoy the facts we see, I have proceeded to wonder about What to Do, and How.

But I am *not* here advocating any type or line of reform. This paper advocates not any solution, but an *approach* to a problem. The approach is the medical approach. There is an ache, within a body. What is it? Why is it? What can be done about it? What will this proposed course of treatment produce? What will this other? A Bar is in this like a body. There are tooth-ache packets at the drug-store which are useful until dentists' offices open in the morning. There are other "palliatives" and "cures" which are definitively vicious in themselves, and doubly, in blind application. There are procedures which tend toward cure, although they hurt. But all really curative procedures, for baby or for Bar, are alike in this: they must look to causes, and wrestle with what has to follow on what has gone before. In this light I express occasional opinion on occasional possibilities of action. But I am *not* saying that in the present condition of Bar organization and Bar opinion any particular curative measure mentioned will be or even can be put into effect. I am *not* saying that, if successfully begun, such a measure will be or can be continued without deflection from its purpose by politics or jealousy or greed or blindness or inertia. Knowing the difficulties, I here advocate nothing. This paper looks to one thing only: to set out a little horse-sense about a situation which when viewed little piece by little piece has not thus far made too much sense for horse or man. Horse-sense about matters where emotions stir, where both vanity and interest and worry and a profession are involved—horse-sense about such matters commonly makes unpleasant reading. The reason is simple: when we human beings are worried we do and say silly things; when we are both worried about being crowded out and vain of our own work, we are in a jam, and act accordingly. When we look back on it, we mostly wish we hadn't. That is why it may be worth using hindsight ahead of time, this time. Unpleasant though this fellow Mr. Horse-sense Hindsight may be.

The scene to be surveyed is the Bar and the work the Bar seeks to do—always with an eye on the unauthorized practice of the law.

The first observation is that something must be seriously out of joint about the working relation between the Bar and that work which the Bar seeks to do. The evidence will not be denied. It piles up daily.

THE BAR'S BOTHER

Let us put on one side laymen's complaints about greed and high fees, for such complaints have been the lot of any priesthood of a mystery since man was man. Such complaints prove nothing because they are heard equally when the job of the profession is done well and when it is ill-done. Let us put on one side also laymen's yowling about technicality, trickery, red-tape, delay, for even if business should be done with the utmost directness and despatch, it would still be complex enough to elicit such complaints a-plenty—especially a business in which every case means a minimum of one client foredoomed to disappointment. Let us turn rather to the Bar's own aches and groans. There we find unambiguous evidence that the Bar's work is out of comfortable cogging.

The Bar complains of "over-crowding." This means, in horse-sense terms, "not enough income to go around comfortably." For though the practice of law be a profession, the practitioner must eat. A profession is an activity in which service rates ahead of gain; but even in a profession, existence is a precondition to service. "Over-crowding" means that some practicing lawyers are having trouble staying alive. *They also serve who only stand and wait* is one of the noblest lines written in our tongue; but it presupposes, most unpoetically, rations for those who stand.

To these observations the cynic Caviller suggests doubt along a number of lines. Let us listen to him for a moment; let us, however, be as skeptical of his ideas as he may be of ours. "Is it gross income to the Bar that you are talking of," says he, "because on that I have seen no figures. If the Bar's gross income were not reduced by the mahogany front and the oriental rug, and the unnecessary but impressive extra square feet of office space and window; and moreover, if the Bar's *then* net income were equably divided among the Bar's members; and, further, if the Bar did not indulge a standard of living which is really the prerogative of *business* executives and financiers[3] and is essentially *unprofessional,* provided 'profession' means 'service-before-gain.' . . . "

It is time to withdraw the floor from this Caviller. He is distracting attention. Let us hear further from the Bar.

[3] The Caviller may have been reading the Wisconsin survey, cited *supra* note to title. It there appears that by almost all the "tests" which an ingenious mind could devise, *available legal business* has in Wisconsin increased since 1880 almost outrageously beyond the increase of lawyers. Of course, incursions on the doing of such business are not covered, but many of the "tests" tried had to do with strictly lawyers' business; others sought to measure the community's *needs* for legal business. Either maladjustment in reaching those needs or maladjustment of income-distribution within the Bar, or and more probably the combination of the two, could reconcile the Wisconsin results with those from New York City. Perhaps a rising standard of living, and of professional outlay, needs its attention, too.

It complains of illicit solicitation of "business" by some of its members, and urges investigation and, on proper showing after hearing, disbarment.[4] The wiser speakers for the Bar link such illicit solicitation with over-crowding, they see economic pressure as a thing which breaks down legal ethics in some, and strains legal ethics in more. As one listens to them, one becomes aware of two undercurrents of emotion. The member who has "arrived," and is safe, feels real disgust at business-chasing. The member who has struggled with temptation, and won the wrestle at the cost of his body, is bitter at having others chisel and prosper.

But the Bar, when it takes the floor, rarely draws the issue cleanly on this point. The Bar mainly attacks illicit solicitation by way of lumping it with outrageous action. The testimony is directed not in clear terms to "illicit solicitation of business," but to a wide and ill-defined offense dubbed "ambulance-chasing." Illicit solicitation gets somehow, rather implicitly, smuggled into that offense.[5] The cases cited do not run so heavily to the sin of getting business by use of runners, they run to fraudulent claims, to perjured testimony, to abuse of clients' trust and funds. For this there are two reasons. The first is that unethical practice has its own touch of the rot in an apple: once the rot sets in, it tends to spread. The second is that the Bar is the Bar, and has learned to argue cases, and prefers to characterize an undesired whole by some unchallengeably undesirable particular instance.

However, we are in the hypothetical chair, and we propose to force clarification of the issue. We rule that fraud, perjury, extortion and embezzlement be discussed first. We know that psychologically and sociologically they do not happen first, in any but a psychopathic lawyer. They are things which some few normal lawyers slide or slip into, over months and years; not evil ways initially planned, nor deliberately embraced from the outset. We know that. But we conceive that we can view the lesser slips more clearly when they are seen unconfused with major criminal acts.

The Bar proceeds, then, making reference to its own disbarment proceedings for its facts. It has occasionally found clients' funds withheld, mishandled, embezzled. Suggestions have even been made in bar associations of a small guild-tax to be laid on every complaint and every answer, to build a fund out of which the Bar's general

[4] "Disbarment" is a word highly interesting in its implications. It presupposes a Bar as a living, working *organism* from which an excision is to be made.

[5] Illicit solicitation *per se* is even more important as a symptom than as an evil. If adequate and reasonably-priced service were really and readily available to the bulk of the Bar's public, and that public knew where to find same, illicit solicitation would not too greatly bother. It would lose most of its gouging aspect, at once; and for the rest, would acquire a flavor which at present writing is moderately respectable: that licit semi-solicitation which all of us can document *ad lib.* When a president of the A. B. A., some years back, explained to the students of a famous law school how a practice can still be built, he was to my mind performing a double public service. He was instructing the young in facts they very badly need to know; and he was bringing out for observation and discussion going techniques so familiar in lawyers' living that the speaker wisely thought instruction in them proper. Instead of being reprinted and circulated, the speech was allowed to drop out of sight. "And many a childing mother then And newborn bady died." Of course, folk who don't like to face fact didn't like it. But accurate presentation of facts is the first condition to cure of conditions. That lost speech would be worth much that has been printed.

reputation in such matters may be made good against the terrific adverse publicity to the whole Bar of one silly outrage by one single member. Apart from embezzlement, the Bar has occasionally, too, uncovered perjury-mills which grind out false accident-claims, or uncovered corrupt and lasting conspiracies of lawyers, doctors and witnesses which swell claims for workmen's compensation. Such mills, though sometimes large, are few. Exposure of them, as fast as discovered, has been a vindication of the honor of the Bar.—"And who provided the impetus to exposure, and the evidence?" cries the Caviller. The Bar, now just a trifle shame-faced, acknowledges that perhaps the insurance companies, who are not lawyers, but whose specialized business was involved, may have had at least some little share in that.

But fraud-in-essence goes far beyond perjured claims or mishandling of funds. It hooks up intimately with solicitation. Solicitation indeed engenders fraud in the claim, as when real injuries, though little, are made huge in court. And solicitation is frequently itself a semi-fraud, as when routine-payments already in process from some government office are made to appear needful of expert advice—on contracts for half of the payment as a fee.

At this point—where not claims in court, but claims outside of court, come into focus—the Bar tends to attack less its own delinquent members than outside folk who have not been admitted to the practice of the law: unauthorized practice.[6] The chair does not quite understand this. The chair's accidental experience runs to finding lawyers and non-lawyers in about equal degree chiselling in between governmental payment of a routine claim and the prospective recipient. But the chair has no business interfering in debate. And what difference does it make? The abuse, whoever may be the abuser, is patent. Something is out of joint, whoever skims off the third or the half for no real service.

The Bar, however, has now swung into a favorite melody, well and skilfully played, and frequently: Outsiders never admitted to the practice of the law are cutting everywhere into the lawyer's traditional fields of work. Title companies are monopolizing title-search; trust companies are monopolizing the handling of estates and trusts, are even poaching on the drawing of wills; collection agencies are collecting; automobile owners' associations break in upon the Bar's duty and prerogative of representing automobile owners; C.P.A.'s are absorbing as much of modern tax business as does the Bar; little "bars" of non-lawyer specialists move into each government department before which it pays to practice; interpreters and notaries and consuls and social workers move in to absorb what would be the legal business of foreign language groups; political fixers fix—and all of this is but the beginning. It is crawling with abuses. These people are not skilled lawyers. (How many lawyers are skilled lawyers, in the particular matter they are handling?) These people advertise, while lawyers are not permitted to—a terrifically unfair advantage; also, they serve as runners for unethical lawyers—even a trust company will retain a lawyer

[6] See almost any unreported discussion of unauthorized practice; and see the shrewd and skilful paper by Clarence Case (1937) 23 A. B. A. J. 941.

at a hundred a month to draft a thousand dollars' worth of wills, or more. These people solicit business in vile ways, and overcharge, and some are dishonest, and more make legal blobs.—At which point one hears little of the troubles which afflict grievance committees, and little of the need for raising standards of admission to the Bar. These are not really forgotten; they merely slip out of attention when Unauthorized Practice is the theme.

Again, as one reads and listens, one grows conscious of two quite different notes in the complaints: danger to the Bar's needed service being rendered; then, danger to the Bar's needed living being earned. This time, therefore, one feels that the notes come from a deeper level, a level much deeper. Not mere personal disgust with indelicate or unlovely ways of competition, nor mere personal bitterness at the success of such. The level here goes to the more nearly fundamental: a whole profession, a needed profession, is fighting in some alarm for its very continued life.

For it takes no Cynical Caviller to make us see that some of these encroachments on the practitioner's ancient fields are like the encroachments of the white man on the Indian: neither right nor law, neither tradition nor stubborn fighting by the gathered tribe, will over long hold up the dispossession. A title company simply can more effectively gather records than the ordinary lawyer can; and over the years it *can* therefore organize to do a job both more quickly, more effectively and more cheaply; it can issue insurance which the ordinary lawyer cannot, against its own error or negligence. It offers a better social machinery for the job. In such a case, over the long haul, there is only one answer: acceptance of the better machinery, and revamping and regulating it to get rid of its peculiar abuses and defects. Or else moving not to throw out the title company, *but to meet its competition.* It seems in Boston to have been possible for *specializing* lawyers, organized indeed into a conveyancers' association, to meet that competition.[7] That helps "the Bar" at large in Boston only indirectly; yet every lawyer well placed in a specialty is a lawyer both earning a living and removed from competition with the general.

As one looks through the list of "encroachments," certain conclusions become hard to escape. (1) Old lines of business are certainly drifting or being sucked into non-Bar hands, but with real probability that this is because they are being done more adequately or more cheaply or both by outside agencies, first; and second, because those outside agencies are making their serviceability *known,* such as it is.

[7] R. R. B. Powell, now in process of studying the title insurance and Torrens situation, generously permits me here to use certain of his results on the facts. *But he is not responsible for my interpretations, which are my own, and which he has not been asked even to consider.* The insurance feature of title insurance appears (thus far) to engage in fact considerably less than 2% of title company income.—But even a 1% need for insurance hurts him whom it hits, and does not (on an insurance plan) turn on negligence. A competing *branch* of the profession, on the other hand, means singularly specialized and expert service. The Boston conveyancers seem to satisfy the Boston real estate trade.—Will this hold equally in a line in which the layman does not habitually consult a lawyer on every deal? That needs exploration.

Meantime title companies (as by the discount to lawyers of which my former students tell me) and trust companies (as by carefully avoiding the drafting of instruments) show willingness to conciliate the Bar, and to work toward a *modus vivendi.* In which lie hints in regard to other fields as well.

This holds importantly in the trust field, in the collection business, in the tax field, in the realm of political representation, to mention but a few. Abuses there are, on the side of lay "practitioners." But the steady drift of business is too steady, it recurs in too many fields, to permit the conclusion that the lay agencies, over the long haul, are not giving satisfaction.

(2) At the same time, and repeatedly overlapping, is a different phenomenon: much business which has never reached lawyers at all, such as petty claims in the metropolis, or estates and trusts based on life insurance and the trust company, much business which has only in the last decades come into existence at all, such as representation before government commissions of modern creation, has been *discovered* and has been *elicited* from "the public" by these other agencies. Lawyers operating by themselves along the old lines would certainly have been slow to know of its existence, and might never have discovered it at all. It is not business taken away by outsiders, but business whose presence and especially whose extent the Bar had never fully appreciated. It is business which the outsiders built. It is also business which suggests very strongly indeed that there is much legal work *still* lying around undone, untapped, waiting for some one. A need unfilled; a market ready.[8]—Yet the very lay organizations which have thus uncovered so much "legal" business are equipped to outcompete most of the Bar for some of the older legal business which the Bar *has* been attending to.

(3) The third conclusion is that the lay organizations thus far heavily noted in their "encroachment" show important common characteristics. They are *specialists;* each has worked out machinery for handling with maximum use of pattern, forms, routine, and concentration of expensive executive decision, a *semi-mass production of legal transactions or legal services* in a very limited field. Given the mass of roughly similar units of business, production can have its price cut in legal matters, as in others. It can be cheapened down into the region of petty business which most individual lawyers would shun as non-rent-paying. It will be strange if the Bar, once awake to the situation, cannot do legal service as well as can any lay organization.

(4) The fourth conclusion which emerges is that the Bar, through all of this development, has been very human. It is of the nature of any profession, when economically squeezed, to turn attention rather to income than to service; and any outsider or observer who feels disposed to make sport of that or to complain will do well to starve a little while he prepares his complaint, and to read some history while he starves. It is of the nature of any privileged class or group on whom a monopoly has been conferred by government to see the prerogatives of the monopoly quite as clearly as they see the duties whose performance is the reason for the monopoly's existence. The Bar is no exception. It is of the nature of man, when in

[8] On this the very careful Connecticut investigation, canvassing a sample of residences and of businesses in residence districts, gave results whose possibilities amaze. See Clark and Corstvet, *supra* note to title. If those possibilities prove out, to even a third, whether in Connecticut, or elsewhere, action is long overdue.

trouble, to seek out a devil, and legislate against him, or incant, or burn. The teamsters did not examine the new pipe-line in terms of economics; they rioted against it. The dairy-farmers did not examine the nutritive or economic virtues of filled condensed milk; they used their votes to get the stuff prohibited.

The lawyers, likewise, have not at first inquired deeply into how these ills have come about, and what they mean. They have turned to the simplest ineffective human devices man has known, in the proper, primitive fashion of *homo sapiens* in pain: Whip the devils out of our midst by disbarment; legislate the competing devils out of the road by unlawful practice acts drawn so broadly that a legal aid society can feel forced to close down, lest it be transgressing; and, for the rest: shut down the output of lawyers (Did someone say "Philosophy of Scarcity?") and keep the young competitor under by longer training and by an apprenticeship during which he can be worked for his carfare.

It is all so very human, and understandable, and almost inevitable, that it would be tragic and pitiful and desperate if *homo sapiens* had not devised a better way. But he has. And the Bar—an intelligent body of men *when they are working for a client*—are recently beginning to discover that their own plight calls for the same resourceful and long-range sizing up of the situation which might be required of them in the interest of some *other* trade association whose motto was: *Service.* And whose continuance was conditioned on the motto's proving true. Today the Bar is counsel for a trade association in distress. Its full and most dispassionate skill is needed. *For its client is The Bar.*

How Did It Happen?

What, then, are some of the ideas which are beginning to come out of the Bar, and calling to be put together, that action may move in the direction of true cure, not of mere poulticing? They can be summed up in one single picture: with an automobile industry pouring cars and traffic accidents into the streets of the metropolis, with conveyor-belts at one end, one-way streets, traffic lights and express highways at the other, with national labor organizations, national markets, nationally organized finance, with "private" businesses and industries numbering their respective citizenry in figures that look like the population-figures of cities, the Bar, in modern dress but in a buggy, attempts to cross the Loop. *Its* organization just about that of 1838—the most individually and individualistically organized activity in these United States. The very peanut vendor on the street will, for example, be found leasing his cart from Peanuts, Inc., returning it nightly to a central garage, or even working as a sales employee in a limited territory, his only independence being his commission. The farmer, the stronghold of individualism, joins a co-op, comes in under a federal government plan, crops for a landlord or a mortgagee. Only the lawyer—most of him—still ruggedly demonstrates the maxim: Divided We Fall.

For consider the conquest of America, well begun a short century ago, sweeping

and swirling through the latter nineteenth century decades: transportation, industry, capital and man power gathering, gathering, gathering together. Gathered into units, into corporate "persons," created by the lawyer's ingenuity. Consider the basic techniques employed: production techniques; specialize, subdivide and combine; standardize, standardize; cheapen by specialization, by standardization, by *mass*-production; use eyes and ingenuity to find and eliminate traditional waste. Marketing techniques; standardize transactions as well as goods (or services), cheapen by standardization, reach the market of the whole nation, build for repeat orders; and advertise, and advertise some more; use eyes and ingenuity to spot and overcome traditional inertia. Form-contracts, Taylorism even in the office. Financial techniques, subdivision again and standardization, with each new wrinkle of any security thoughtfully provided by a lawyer—to bring capital together into newer, huger units. This, with all its exploitation and its draining of men, with all its incidental politics and bone-crushing, is the picture through which the Bar drives over a century, changing its dress and its manners—but not its buggy.

Organization, cooperation, coordinated group-work, specialized work, mass-production, cheapened production, advertising and *selling*—finding the customer who does not know he wants it, and *making* him want it: these are the characteristics of the age. Not, yet, of the Bar.

These characteristics,—modified only to write *need* for *want*—are compatible with the highest and noblest professional service. They can be made to conduce to finer, fairer and more wide-spread service than the Bar now gives. But even more important (because eating does precede service) is that until the Bar *as a Bar,* not as an agglomeration of individuals, discards its buggy, the Bar will suffer much—and most of its individual metropolitan members will suffer more.

The canons of ethics on business-getting are still built in terms of a town of twenty-five thousand (or, much more dubiously, even fifty thousand)—a town where reputation speaks itself from mouth to mouth, even on the other side of the railroad track; and reputation not only of the oldster, but of the youngster. The youngster is watched when he hangs out his shingle; watched if he be a home-town boy, watched doubly if he be not. Word of law's work passes the time of day, along with side-taking as between the Mathematics teacher and the High School Principal. All the lawyers are known, and people who have legal work to do are moderately aware of it; and they have little difficulty in finding a lawyer of whose character, abilities, experience, yes, and fees, they can get some fair inkling ahead of time. And—no little item—where reputation works and counts, the overhead becomes materially less. "Front" that socially and personally is waste is peculiarly a privilege and an expense of the metropolitan lawyer.

Turn these same canons loose on a great city, and the results are devastating in proportion to its size. If a small client does not know to whom to go, he does his pondering with all the folk-lore about lawyers stalking blackly through his brain—

they over-reach, they over-charge, they are not even to be trusted. This means, in result, undone legal business. A-plenty. Or it means turning to some non-lawyer who undertakes to help out. Or it means chancing it. If the client chances it, he very truly chances it: the conditions of metropolitan legal business make it no simple thing to reach into the grab-bag and pull out a lawyer who is able, experienced in the case at hand, not too taken up with other matters, and also reasonable in fee. Here, therefore, one needs stress on one line of points too often overlooked:

(1) Whether the client is fairly charged or not, if he *thinks* he is overcharged, he is for twenty years a walking, talking, publicity agent against the Bar entire.

(2) Whether he is well represented or not, if he *thinks* he got inadequate service (and neither the Law nor the Jury nor the Judge affects too much his own view of his Rights—which Somebody must have Done Him Out of—for he, too, is a devil-chaser) he is again a walking, talking, stalking publicity agent against the Bar entire. Gratuitous. He needs only a chance to tell his story.

(3) But if he goes to a non-lawyer, and gets poor service, he will still hold that against The Law.

(4) And if he goes nowhere, and gets nothing or worse, he will still hold *that* against both Law and Lawyers.

It is a true picture, this, of prospective small clients who need service and help in great cities. It is meat for the political fixer. It is meat for the ward-boss. It is meat for the siren-singing of the ambulance-chaser's runner. It is meat for the jailor who is tipster for the bondsman and the criminal court hanger-on.

For there *are* jobs to do, and jobs to get. Needed done as badly as their doing is needed. There are also cures available. But let us push the diagnosis further, first.

I do not mean to suggest that there are not within the metropolitan bar groups of lawyers who have effectively made the adjustment to business-getting which they need. There are indeed such groups. Outstanding is the adjustment of the so-called law factory, with its typical specialization on the higher brackets of corporation law. Within the relatively small world served by such a legal plant, its product and reputation have the same chance of becoming known by mere performance, reputation of a senior partner, or personal contact, which holds in a smaller town for the general lawyer in relation to the general community. No less to the point, in regard to the law factory, is another feature to which I shall recur: the careful development of specialization within the plant, and the accumulation, by forms, files, and specialized experience, of something approaching a mass production technique. The smallness of the fee, for example, for putting out an important bond issue, when taken in relation to the skill, authority, responsibility, labor, and speed of the personnel involved on the legal side is almost startling when compared with the general run of less specialized legal business.[8a]

Another type of adjustment lies in specialization on the business of business-getting. Here it is enough to mention the politically connected lawyer, with his road

[8a] Fees arising out of reorganizations based on the same bond issues are, of course, another story.

into patronage;[9] the solicitor of negligence suits, with his runners; the criminal lawyer who has built up his regular clientele. Indeed, in a broader sense, and with no suggestion of impropriety or even indelicacy in their building of a practice, there are, in every metropolis, the whole range of what we may think of as the middle and successful bar. But one point for us here is that such lawyers draw their clientele either from organizations (business, labor, philanthropic) or from persons of moderate means; and the further point that their almost necessary office appointments provide for any accidental visitor who has to watch his dollars a psychic handicap to consultation which is too often forgotten as the lawyer considers the need for impressing his prosperous clients as being himself among the prosperous. And, perhaps, a still further point. When clients who are steady clients have to be guarded; when lawyer's Service includes going up to the client's office; when fee-justifying seems to require putting on a show; when non-permament juniors have to be kept from meeting the sources of business; when, in a word, *good* lawyers' thinking gets distracted from the lawyer's job—then, for some part even of the successful Bar, there is a most unwanted maladjustment—working itself out, as things human do, if left untended, by competitive disruption of the whole. In a word, while the upper reaches of political, of corporation, and of criminal practice find contact between client and counsel moderately simple, and while the person or group of moderate means has reasonable outlook of finding a lawyer to his liking and suited to his pocket, we are left with two thirds of the bar and eighty per cent of the public who lack either the contact or the means of making it.

THE HURDLE OF EXPENSE IN LEGAL SERVICE

The next matter which calls for attention is the cause of the exceedingly high price of legal services in this country. On the whole, the bar is unaware of the existence of the phenomenon—and perhaps for that reason uninterested in its causes. The bar has grown up with the causes as part of its natural environment, has adjusted to them as one adjusts to the pressure of the atmosphere, and would read with amazement that legal services could be performed at a level of charge materially lower than that with which they are familiar.

And, indeed, in these United States, certain of the causes may be regarded as permanent. These are the organization of our law itself, first, by forty-eight separate jurisdictions, alongside which run ten semi-independent federal circuits; and second,

[9] Attempts either to control abuse or to allocate return in this connection have rarely moved with realistic hard-headedness. Perhaps too much is in the way. But when a Bar Association (as at least one has) taps off ten percent of every fee from patronage, to be administered for the relief of distressed lawyers, it moves toward combining sound engineering with group spirit. Substitute a graduated percentage scale for a flat one, and the road opens into a scholarship fund, as well (with a new problem, then, of a new kind of plum, best dealt with by letting law schools pick the scholarship men; they have both some expertness and a direct interest in students' quality). No less: no Association Committee could receive funds, over long, without acquiring some partial responsibility for holding down abuses in the patronage from which the funds flow. This means nothing at all, initially; but over the long haul it would mean a focus, both of criticism and of (possibly unwise) action. But a *focus* is a thing folk can deal with, as best they can, if they only get it.

the fact that our basic legal technique is that of case-law, on which is superimposed spasmodic, unsystematic, and inadequately indexed statutory amendment, with the statutes themselves operating only state by state. This is the legal system that we have, and this is the legal system that we shall be living with. But to understand its effects upon the economic condition of the Bar and upon the Bar's service in a metropolitan community, we shall have to examine into why it is an incredibly *expensive* system. It is expensive because law is only local; because law, even for the locality, is hard to find, and slow to find, and calls for a book-equipment whose price would turn gray a Continental lawyer's hair. It is expensive because the foregoing facts produce a Bar whose members can become specialists in only very limited fields, at best, and most of whom are specialists in none. In any matter in which a lawyer lacks experience, the organization of our law itself heaps on him time-burdens in equipping himself to do a right job. One road out is to charge the client for the lawyer's self-education; that may be necessary, but it does not make for economy of service. Worse, the education may be wasted for the future: too often such a case never turns up again. No one who has never seen a puzzled Continental lawyer turn to his little library and then turn out at least a workable understanding of his problem within half an hour will really grasp what the availability of the working leads packed into a systematic Code can do to cheapen the rendering of respectably adequate legal service.—Let me not be mistaken. I talk not of supremely expert advice. Few, in any nation, can afford that. I speak of the work of the rough-hewn electrician who at least can be trusted *on quick call* not to blow out fuses or give advice which short-circuits and sets the house ablaze. And again, let me not be mistaken. Few honor the virtues of case-law more than I do. But cheapness is not among those virtues. Neither for the society nor for the particular client. Whereas costly services are luxury services. Luxury services do not support a trade which verges on two hundred thousand strong. Unless, like 1938 auto-models, they are *in demand*. Or unless, like used cars, they have come to be thought necessary, to get to work.

It is against this background of necessary relative expense that the Bar's organization, peculiarly in the metropolis, but even in the smaller centers, turns up in less-than-1838 adequacy in getting the price range down *as far as it will go*. With no desire to idealize those good old times which are perhaps "good, because they are old," one can yet observe that a lawyer on circuit had a deal of opportunity to learn from or consult with his brethren, and that all reports indicate club-feeling to have been strong. One can observe that the youngster was almost forced into all-round learning, into learning from the whole group of his elders, at every circuit, and into learning about the very matters of most interest to him in his budding practice. One can observe that the tower of law books to be mastered, and even of those to be used, bulked more like a wood-shed than like the Empire State, and even that the law itself was then more fluid and more ready to yield to sense and "principle." One can observe that court and legislature put out about all the law there was to wrestle

with, that administrative commissions did not dot the landscape, that the ranging intricate specialization of economic and even of social life had not yet set in—while today a rich man's problems, say of income tax, have become an unsounded mystery to a lawyer who may have practiced in the next street for a generation. In a word: the whole game was simpler, the beginner understood more of it, and Bar and practice were organized in such fashion as to teach him faster than today, and to make it easier for him to find and get advice he needed. Less time needed means less need to charge, and a greater portion of the public's business reached.

In the modern great city, this getting of advice by lawyers is not simple. We all understand and use the luncheon with the friend who knows—if we have and know a friend who knows: a practical, obvious, and wise device. It does not wholly solve the problem, but it tremendously reduces both the risk of error and the time required for the job in hand. We leave to chance, however, the knowing of the needed friend. And those who need him most are least likely to know him. So out of the idea of *group*-movement have we grown, indeed, that the "specialized lawyer consultation service" instituted by the Illinois State Bar Association—an excellent lead—is reported as hardly beginning to find the use it can. When one remembers what one blob by *any* lawyer, for lack of sizing up his problem, can do against the practice and reputation of the Bar entire, it becomes probable that the bulk of the Bar may be swapping the buggy for Shank's mare.[10] In times of economic stress for the profession, this may be short-range individual wisdom for many, but it is not long-range wisdom for the whole.

More generally than by such innovations as the experienced lawyer's service, the Bar has moved against one feature of expense by the cooperative law library. Still more generally, it has once more—as with the trust and the collection and the landlords' protective association, the civil liberties union and the anti-boycott league—left laymen to show the road to organized and effective *legal* action along some specialized line. I have in mind the publication of law books, and especially of all the devices for speeding up the finding of the law: advance sheets, texts, encyclopedias, annotated leading cases, digests, citators—and last, swiftest, those aids in the current welter, the "services"—which are expensive. The Bar's own unwieldy effort, the Restatements, is no substitute for these. What remains in the way of aids is largely government work: semi-codification, the federal index to state statutes, the work of legislative reference bureaus or of a council of state governments, and the like.

Yet all of this only slows, it does not stem the tide. The pooling of practical experience is the only available immediate road to importantly reducing the costs of finding law and of learning how to use it. There are some books which help. Most

[10] The smaller centers face the problem, too, in their own way. Though the legal problems arising are likely to be less complex, yet country and the small town are feeling the impact of the law, as well as the market, of the industrial, national economy. And where court-jurisdiction is divided by counties, and Bar-courtesy dictates turning local business over to the local man, the experience-swapping of the old-time circuit wanes.

form-books are still unannotated hodgeporridge, but they show the way to better things. Many practice manuals are chockfull of good sense. I have even seen one moderately instructive book on how to prepare and try a case. And in a very few fields of law there are texts which do what *in a medical book is taken to be the author's duty as of course:* to wit, present along with the rules of law a description and critique of the best known procedures in doing something effective about it. A corporation trust company, on the other hand, makes profit out of specializing and routinizing the actual doing of something effective about it. So do all the various agencies, the useful ones, now so vigorously under attack for unlawful practice. So do the legal departments of banks and business outfits to whom enough transactions of a single kind come, to make experience cumulate, and to enable the building of routine. So do those government departments whose servicing is drawing off so many members of the Bar and negotiation with whom is affording so much new practice as well as so much new trouble in law-finding. Is, then, the individualistic Bar, familiar both with the value of the casual luncheon and with the efficiency of non-Bar legal work on every side of it, never to put two and four *together* and see that while 2—4 is an unfortunate result, 2×4 can be one of real interest?

No one move is panacea, even if well and wisely made; nor will any cure come quickly. The metropolitan Bar suffers, for instance, also from unwieldy and unfortunate overhead—due in good part, as has been mentioned, to the double need for "front" when the mouth-to-mouth machinery of reputation-spreading is unavailable. Due partly, also, to a *need* for charging more than the traffic ought to bear, even when the service was in fact routine and quick. A need, I say. Uncertainty and irregularity of income force high charge. The law-factory must be equipped to handle sudden peak-loads; but the staff is always there. The small office moves on the same principle which its members rightly reprobate in bricklayer, plasterer and electrician: it insists on high wage per hour or per day, to cover the uncertainty about how many working hours there will be in the oncoming year. Both deal with the uncertainty as if it had to be. Whereas a retainer which can be counted on means not only a lower price for legal service (more regular flow of business; more business of one kind) but an easing of worry-tension, and a lengthening of the lawyer's active life.

Now how much serious attention has the Bar as a Bar yet given to the subject of retainers? To educating the small business man or small corporation in their value, and in the value of *consulting* service? To the possibility of developing, and on a moderately wide scale, *group*-retainers from persons whose legal needs are individually non-recurrent or infrequent, but who, taken in bloc, have like needs which *do* recur? Group-insurance, even group medical service, are today as familiar almost as the grouping of men in mine or factory to handle the recurrent tasks, and so to raise income while production rises. But the Bar considers the problem still no further than from the angle of unethical *individual* solicitation of practice—or the angle of jealousy, or of fear of politics and patronage.

Indeed, as one observes the use of front and overhead largely unnecessary to the work, one is forced to grieve that too many of the metropolitan Bar have drifted into learning from Business chiefly the less fortunate excrescences which Business has to teach: useless magnificence of furniture, cream-skimming of return by the senior with skim-milk to the junior, measurement of a man's worth in terms of business-getting power, methods of competition which verge too often on piracy, charge measured by what the *immediate* client can be made to bear. Whereas those things which give Business its excuse for existence are not yet learned: discovering markets for things people really need, but do not know they do; getting the consumer and the purveyor together, *distributing* what is wanted into the far corners; discovery of methods to unify service and to reduce unit-cost and price, and to purvey better, to more, for less.

The Bar has been largely a monopoly. It is busily engaged by legislation in seeking to become a monopoly again. Now of monopoly, and from the pure enterpriser's angle, we learn from most orthodox economists that "A monopoly which controls an article of very elastic purchase—a luxury or a costly convenience—must be careful not to put its price too high, lest its sales fall off and its gains decline or vanish. Wise selfishness may in such cases dictate a fairly reasonable price, not much above the cost of production."[11] Of course, wise selfishness always dictates also lowering the cost of production. Of course, the professional aspect of law dictates an attempt to spread law's service as far as effort can.—The three ideas, put together, speak for themselves. It would seem time for this particular monopoly to gather itself for concerted planning.[12] Only group planning, and group action, can help or cure.

POSSIBLE CURATIVE PROCEDURES

The first and obvious move is for the Bar, as a Bar, to apply business methods to the task of making contact with its customers. For long range work along this line there will be need for careful and skilful sampling studies to develop what kinds of matter come up frequently in the community on which legal assistance or counsel would be of value, and among what income groups, and what percentage of them get referred to anyone for such assistance, and among these, what percentage reach lawyers, and how the lawyers were found or why they were not found or not sought. Which would look like a large order, and a silly one, if a study in Connecticut had not already demonstrated that it can be done, and how to do it. But it does take

[11] 1 FAIRCHILD, FURNISS, AND BUCK, ELEMENTARY ECONOMICS (1926). In the Third Edition (1936) c. XIII, the precise language quoted is somewhat modified, but the point is made more at length and more cogently. "The ever-present possibility that 'something just as good' may appear puts a very real check upon the greed of many a monopolist." (286) Or: ". . . the price which brings in the greatest immediate return . . . may stifle future demands." (287). "The last thing desired by any monopoly which has thus far escaped it is unfavorable public attention and legal investigation and control." (289).

[12] The bearing, at this time, of certain phases of procedural reform, is patent. The prepared case which is ready but not reached, with personal presence required at calendar call, and the common absence of any preliminary procedure to straighten out what issues are really in dispute, are magnificent instances of matters which not only raise costs but deter any client from ever doing it again, or letting anyone else do it at all, if it can be avoided.

some money, and it does take some skill, both in setting the study up—on which material is now available—and in execution.[13]

There is, however, no need to wait upon such a study of the market—one such as sales managers and advertising counsel have been making for decades. There is another thing all ready for the doing: call it publicity, or public education, or advertising the Bar's service, as you will. It consists in the Bar, as a Bar, using the newspaper, the magazines, and the radio to make members of the public see who have never seen before what a lawyer can do for them, and why they need his service. A legal ache is not like a tooth-ache. The man who has it does not need to know he has it, until matters have progressed too far for remedy. A contract with lop-sided but enforceable catch-clauses needs to be caught before it is signed. Forfeiture conditions (which may be reasonable) still need to be known about in advance, warned about; at need some means must be devised for a client to tickle his memory by marks on the kitchen calendar—else the forfeiture is known only after it occurs. Such things few laymen realize, and most would be interested in knowing; and *sustained* publicity can not only inform them, but can slowly stir them out of inertia into action.

Provided, however, that there is a place to go which is convenient and which is made known. "Consult your neighborhood lawyer" will not work. Either he does not exist, or else too often he is hardly the man to consult. Perhaps, with such a campaign well under way, one could induce some good young men to open up in the neighborhoods, to save on rent and front, and to acquire a practice. But to date, they haven't.[14] Hence, a publicity campaign, to be effective, entails some further steps.[15]

Beforehand, it is necessary to avoid a few misconceptions which lie close. There is no thought, of course, of any *individual* lawyer or firm advertising or being advertised in this fashion. It is "The Lawyer's Services," publicized by the organized Bar. But there are other misconceptions. Speeches, for instance, about law-and-not-

[13] See Clark and Corstvet, and *Manual,* both *supra* note to title.

[14] The down-town address appears to have peculiar prestige-power. Which sets a man wondering how far four youngsters in partnership could average down expense and yet build up a sound practice by having three of them running three "local offices" of "Perkins, Petrosky, Picarello and Patrick, 120 Broadway."

[15] The kind of phonograph material one would have in mind would be such as this: "If you have a problem like this, or like the problems we have talked about, then see your lawyer. Tell him why you came. Tell us you went to him. [If you haven't a lawyer, see your neighborhood lawyer and tell us that]. If you don't know where to go, consult Bar Service, address..... They charge a dollar to look over your problem, and to advise you how to go about it. Law isn't much easier than living, and they may not be able to help you. But they will try, hard. They make no percentage or profit out of their advice. They are there to help you. If you have a problem like this or like the other problems we have talked about, then see a lawyer. If you don't know where to go, consult Bar Service, address.....

David Diamond, reporting excellent radio work in Buffalo (1937) 23 A. B. A. J. 940, adds at 941: "We cannot and do not ever say 'go see your lawyer.'" If the procedure rests purely in publicity, such caution is not only wise, but necessary. And the Buffalo publicity techniques deserve study. But why do they have to be thus crippled?

men or about how the lawyer is the priest of justice, made by men of great name whose very reputation insures that they will never get down to brass tacks—such stuff in turn insures a flop. What is required is concrete, dramatic episode, worth waiting around to tune in on, or looking through the newspaper to find. If printed, the kind of occurrence which is news. With an arrangement with the editor whereby before the story is written up or published, the reporter contacts the Bar publicity man to make sure of the proper Bar angle coming out in the story; or, better, to give time for writing and more room for pointing the moral, and to achieve some independence of day by day occurrences, the institution of a specialty column on the subject. Conditions will vary from city to city. What will not vary is that a writer who knows his writing and his public will be needed; and that newspapers can be interested in the matter gratis, as human interest stuff which also serves their readers. What also will not vary is that a story for the laborer is not a story for the business man, nor, often, a story for the petty retailer one for the clerk and his family. Not shot-gun material, but successive rifle-shots (with dumdums for the mark and noise for the spectators) is what will function. The same type of thinking holds for radio work. Free time can be procured, but skit-writing and skit-acting are not jobs for well-meaning amateurs. Finally, it may be hoped that the cheapest type of enlightenment on what legal troubles and worries are lying around unattended to, will be found in fan mail from either a column or a weekly radio skit.

Fan-mail needs answering, and aroused interest gets nowhere unless there is machinery for bringing the prospective client to the man he seeks. Aroused interest which finds no attention goes sour. Any Bar which undertakes such a program must be prepared to furnish a consulting and sifting bureau. A charge of a dollar to get in will keep out cases which belong to the legal aid, and discourage a fair percentage of the cranks and psychopaths, and go some distance to meet the actual outlay of such a bureau. If advice is givable and given on the spot, a fee of a few more dollars will help further to meet expenses, and reinforce the notion that service costs something, and build up experience with *reactions to the charge.* Expectation of some charge must be prepared in the publicity. But reactions to the charge itself, in such a bureau, can put together what no single practitioner has ever dared to mention publicly—save over the confidential lunch or glass of beer—to wit: how to estimate what *this client* will bear. Such experience can then further put together what few single practitioners, in their most confidential moments, even think of, save in regard to some particular client, to wit, what will *its continuing* traffic bear? Whereas we need more. We need to know, in general, what *The Traffic* will bear, in terms of easing work in, rather than damming *(or damning)* work out. This is the problem of income to monopoly. I have no fear, as I state it thus, because the only conditions under which its income-features can be produced are conditions which *widen, strengthen and lower the price of service of Bar to People.*

Personnel for such a bureau can be secured, under a salaried permanent head,

either (and preferably) by donation of the services of a junior by each of a number of those leading firms to whom the cases will in no event be referred,[16] or by hiring able young men on two-year contracts (to avoid any suspicion that they may build up their own contacts, and jump the job).

The major difficulty, even though these should all be solved, remains: the reference list and its use. As to a list, there is no escape from the dangers of politics and wangling; but one can feel that, throughout the initial stages, insistence should be laid on the fees in reference cases being materially lower than has been considered reasonable, and on the work going to competent men who have been having difficulty getting clients. Will this undercut the income of the other members of the Bar? I do not think so. I feel personal confidence that such a campaign, within a year, will not only leave unscathed or improve the income of the Upper Bar, but will be felt materially and gratefully throughout the lower income brackets. But some risk along this line must be taken. It must be taken because if the word ever gets around that this is just another gouge, the cause is lost—both free assistance in publicity and growing interest among the theretofore uninterested client-prospects. Complaints there must be; and open invitation to come in both concentrates and intensifies complaints. Yet in the first place, good work stands up; and in the second, a lawyer who has no eye on fat fees, and whose client's case comes to him already *prima facie* worth looking into, and with the client already responsibly assured that the lawyer is both competent and fair, comes under considerably less pressure than usual to hold out more than he will be able to deliver.

Two types of case are lumped together in the foregoing happy and light-hearted sketch. They will not stay together in any comfort. They are the case with some real money in it—the negligence claim, or the retainer, even small—and the case without. It is the former which will give color of peril to the project; not inside the list, where it would be easy to see to it that no man got two such lucky breaks in a single year or six months, but outside the list, for fear law services would follow Gresham's law, and the cheaper drive the dearer off the market. I pose the problem. To me, it seems a *political* problem, a problem of dealing with the votes of brethren who will fear ghosts that are not there; but brethren who have votes. The actual engineering is not hard. My space runs short, but I offer one of the easiest and least desirable of the various workable ways out: any case with as much as three or two hundred dollars actual, or three (or two) times that amount of contingent money in it, can be referred by the sifting bureau to the now existing Bar Association list. Not a noble solution. But surely one which would lay silly ghosts.

[16] This is not speculation. An office built to carry peak loads has, repeatedly, men that can be spared. This provides the edge in. What is then necessary is to secure the firm's engagement that the man loaned is loaned for a long enough period to make his breaking in worthwhile, and is not subject to irresponsible recall. This, too, is doable, though definitely less welcome. But the general public spirit of leading lawyers can be made by moderately intelligent salesmanship to yield as much for the Bar as for a hospital campaign. They are slow to see, but when they do see, they see with a lawyer's acumen. They can even be got to underwrite overhead for a two year try-out.

But not only are two types of case thus lumped, but two types of institution. A sifting and reference bureau is a necessary corollary of any intelligent publicity campaign. No less a corollary is a bureau which will pick up the legal burden of the little man to whom three to ten dollars for preventive advice means trouble with his butcher bill—or rather, since he pays cash, means two (or two more) meatless days for a number of ensuing weeks. He can pay something, and so does not belong in legal aid. He can mortgage the future, and pay more—but only pressing emergency makes any legal service seem to him worth that—as when his Jim has been arrested. Yet he too will be listening in on the radio, or reading; or will have heard from friends. To turn him away as overflow, because he cannot pay all his way, is neither pretty nor wise: on him, too, depends the goodwill which keeps a campaign going. One of him, you may be certain, will be an Inquiring Reporter with a tale to write. A legal service bureau, akin to legal aid, but with a charge, is needed to take care of this; so is the type of inquiry one can learn from legal aid and from the hospital clinics, to keep fakers and grafters from drifting in. But whether to merge the legal service with the sifting and reference is a problem of overhead and of administration. To me the idea appeals somewhat—it might save time, rent, and effort.

And how does all this bear upon the problem of unauthorized practice of the law? Directly and immediately, in two ways. It will relieve a substantial portion of the existent suffering among the Bar. A substantial portion only—for only *competent* lawyers can an association or the allied associations dare put and keep upon the reference list. By so much, however, it decreases the major bother of unauthorized practice; and decreases it not for the moment only, but into the future, more and more. The road to the lawyer once found, and found good, remains open to a family and their friends, or to a business man for his future needs. For the latter the found road plus persistent publicity opens the ultimate possibility of the retainer; indeed, should the Bar ever get around to countenancing such a thing, the way opens for petty business men and even families in groups to be moved into the retainer field. Utopian, at the moment; but along such lines of developing business—and service—*where there is no possible competition,* lies one defense against *any* unauthorized practice.

The second direct effect rests in the balancing of one heavy competitive advantage of the unauthorized laymen: Our Advertising set against Theirs. The layman retains the advantage of direct solicitation. But who of those who do not run a racket, (if they do, they ought to be suppressed for that reason alone,) have been thus far using this method in great measure? On the advertising side, I prefer again to speak bluntly. It is open to a Bar which is actually rendering service, even where service does not pay in the particular case, and which can utilize in its publicity that fact plus the whole finer tradition of a profession, to capitalize such frauds and grafts as occur in unlawful practice to a degree and with an effect which no lay outfit whose advertisement must be paid for, and which is seeking to draw business to

itself, could dare to do. Does this mean merely *balancing* the layman's prior advantage?

Important as such direct effects might seem to be, I am inclined to rate more highly an indirect effect which (as being only an hypothetical upon an hypothetical) it might seem idle to discuss. That indirect effect is the development of techniques for semi-standardizing, and so cheapening, and so making available to a vastly larger clientele, a hugish number of normal legal services. On which follows the institution of a Bar clearing house for such techniques, and Bar facilities for consultation of another lawyer on matters which as of any given moment may have proved incapable of semi-standardization. This, if it should happen, would mean a Bar which had moved in terms of American industry as well as of American business, of mass-production as well as of selling technique; and also in terms of adjusting its operations to the conditions both of our queer law and of the Bar's own highly individualistic outfit-organization.

The curious thing is that this is really no hypothetical upon an hypothetical. It is instead an almost inevitable upon an hypothetical. What is dubious of occurrence is a sane publicity campaign with its logically immediate corollaries. Given these, however, the indirect effects referred to follow almost as of course. For how can a legal service bureau do its work, without that work leading to standardization precisely in the fields where that is most needed, and to widening market by lower service charge? Not only are there recurrent types of matter, but there are, over relatively short periods, recurrent new men to be broken in, and without expectation that they may stay on indefinitely. The former provides the wherewithal to work out usable guidance materials; the latter, unless the bureau be understaffed to the point of destruction, forces that wherewithal into use. Once prepared, it should be available to any member of the Bar. It will have major gaps, which any lawyer working on his own may need; it can, for instance, by very definition provide no light on the routine things to do and the dangers to watch in such a moneyed procedure as, say, title-closing or mortgage-taking. What it can do is to show up for the whole Bar's meditation and use that many matters which occur also among clients who can pay their way are vastly more capable of *communicable* schooling and even routinizing, in print, than any but eight of ten single lawyers have even taken time off to *realize*.[17] While the sifting service, unless it is so horribly understaffed in turn that it can neither keep records nor work up their meaning, will show what types of business are emerging in sufficient quantity to require putting a man to work to do the same job of gathering, digesting, and communicating experience with procedures and with difficulties to red-flag. Again, for the whole Bar's use. No divinity has decreed a buggy for the Bar.

[17] At this point bows to Harold Seligson of New York—and to his collaborators. The courses he has organized in what one might sum up as Problems of the Younger Lawyer both do their own job and tend grandly toward doing the one I speak of. It is described (1937) 8 AM. L. S. REV. 926. The accompanying papers give a good picture of the present state of the matter.

With such things in prospect, but in prospect only, there is one matter on which the sifting service research crew can turn loose at once, and without waiting for any advertising campaign to bring any results: it can turn loose on any type of specialized matter which existing experience with unlawful practice has already shown to be a place where mass-production methods work and where the Bar needs better equipment for cheap and speedy service. No doubt about that need, nor about where it lies, nor about the feasibility of attack on it.

It is possible, however, in a number of such fields, that it may prove to be not economy of legal technique, but rather economy in *administration* due to the concentration of like cases, and delegation of most of the work to routine employees, which gives the lay organization the competitive edge. And no individualistically organized Bar can wholly meet that difficulty. Hence, where, after reducing the Bar's necessary costs so far as may be, such proves to be the case, I have wondered at times whether (in partial interest of a Bar's living) a compromise type of statute might not in the long run serve both Bar and public better than flat prohibition of the competing lay practitioner. I mean a statute which would allow the latter's service, but with a top limit on the value of the case or transaction concerned, a top limit measured high enough to pay him for continuing in his game to take the smaller cases. Whether or not there may be anything in such a vague idea, as to either commercial or cooperative lay lines of competition with the Bar, one thing stands clear: to use the criminal law to hog business *for* the Bar without making provision for reasonable attention *by* the Bar, at reasonable charge, to *all* that business, is to play not with fire, but with TNT. These lay competing agencies are not politically inert, nor have they served clients of that character. The agencies' life is at stake, and their customers have discovered how adequate and reasonable certain phases of legal service can be. Of course, certain statutes have passed, with no such preliminary precautions taken, and no explosion has occurred. Not yet. But I dislike to think, in an industrial state, of what is likely to happen to the Bar if such a statute is abused, when, e. g., (as is already in the definite offing) organized labor once wakes up to the possibilities of legal service not only for the union, but for members, and business men discover one point at least on which business and labor have a common interest. I dislike to meditate on what a good publicity man could do with lawyers, in an anti-Bar-monopoly campaign, if he set out to use the material from the records of the Bar itself, and the methods of exploiting it which the Bar, in its pro-monopoly campaign, is teaching him.[18] Despite the record of the statutes passed without prior precaution and without apparent later row, the applicable word remains: Be ve-ry gentle with it!

There is another aspect of unauthorized practice which needs mention. Plainly, we need to distinguish, among our lay brethren, decent business men and cooperative outfits from lice and scroogers. Plainly we need suppression of these last. But, apart from economy, is there not a virtue in the former which is little mentioned, but

[18] As, by Case, *supra* note 5.

which calls for the Bar's attention? I refer to *reckonability* of the *results* they get. In addition to standardizing the techniques for performance, they afford moderate assurance in advance that those techniques, so provided, will be *used* with average competence and good faith. Can we meet the competition there? We, supervised and knit together as leaves are in October?

Chanciness about result is tricky in its operation. When a lawyer feels his income chancy, he gambles on the worst, and zooms his fee for the case in hand. When a client feels his prospective service to be chancy, he does more than that: He stays away. Yet on the other end, when a college boy reads once in four years of some single headline-making fee—which he must know is chancier than any lottery—he gambles on the best, and pays, too—and draws five cards, to join the Bar. In a jack-pot. He does it, by the thousand.

But the chanciness of our service remains a vital factor in the unauthorized practice picture. Trust Companies make clear that they, as corporations, survive the chance of your lawyer's death. Title companies, in their turn, make much of the insurance they offer. Whether or not the factual value of that insurance be very material, the client's *feeling* of assurance is. Now I strongly suspect some such feeling that the customer really knows where he is at to have a strong part in each other field of encroachment which has succeeded without indecent means in becoming a thing for lawyers to bother over. Can we offer to *our* public a similar feeling of safety about moderately competent *use* of the available techniques? Let me put the question this way: which of us would care to entrust his own interest to any first lawyer whom he happened to pull out of the grab-bag? Which of us would feel it to be *equal* nonsense to entrust his own interest to the first trust company, title company, collection agency, automobile owners' association, legal aid society, civil liberties protective association, landlords' guild, whom he happened to pull out of the bag? There is no positive assurance to be got out of mere size; there are men still alive who can recall real estate "finance" from which title companies were not wholly disassociated, and who can recall interesting relations between widows' trust funds and the duds left on the counter of a securities affiliate. Size alone guarantees nothing —except easier possibility of supervision and more concentrated attack, more effective reform, in the event of abuse. But in any matter in which the customer's check-up comes quickly, if size is found together with continuance in business there is enough to show a *prima facie* record of moderately adequate performance. The law factory can and does claim that advantage over individual lawyers, and mints the public's understanding of a presumption which, though occasionally tricky, is nonetheless for any man a sounder base for action than a grab-bag. Few lawyers or law firms work today in groups big enough to meet this aspect of their better lay competition. For in the area of unauthorized practice—the wild 20's apart, and they were the whole country's and no peculiar possession of the Bar's competitors—in that area the exposures of dirty dealing or of gross incompetence relate peculiarly to the in-

dividual or the small fly-by-night outfit, not to the bigger groupings with an address and a reputation, still less to cooperative lay legal ventures.

In which, for the Bar, there either is a lesson, or there is not. Monopoly legislation, at best, drives business merely Bar-wards, to be picked up—when it is not thereby dammed off—by any lawyer who happens to get it. The adverse advertising value of one client abused is not here to be labored, but it is to be recalled. And let the fact be looked at openly for once. Why, with the whole profession at stake, must it be pussy-footed? The fact is that a third or more of the lawyers now in practice in metropolitan areas are incompetent. Law school faculties give degrees to men to whom the faculty members would under no conditions entrust their personal business. Bar examiners find no way to keep such men out of the Bar. Practicing lawyers, individualistically organized by tradition, feel no responsibility for training the green, raw rookies from the schools, even the good ones—though, I repeat, any error by any one of them blots and blurs not only the reputation but the very livelihood of all but the best established of the Bar.

Now either monopoly legislation or any Bar publicity campaign must face the fact that some of the resulting business—and a little is enough, for the harm to be done—must go to these incompetents. A publicity campaign must face the fact that wangling and favor, even with safeguards, will lead to the presence of some incompetents even upon the reference list; though this is not so troublesome; work can be watched. More bothering is the case of the clients who go not to headquarters, but to "some" lawyer—who proves to be the wrong one—and then get active in their counter-publicity. "Just one more gouge: the experience of Acidophilous G. Robins."

I see just one road out of this which would be workable in terms of human motivation. I shall describe it. As an intellectual exercise; for I cannot believe that a buggy-riding Bar could ever bring itself to act on an idea whose only virtue would be, by group-action and a bit of forethought, to drive the Bar's competitors to the wall. The fantasy has to do with an institution of pre-Soviet Russia, modified to fit American conditions. In the Russia of the Tsar, certain skilled crafts were organized into *artels,* of which the characteristic here in point was that the whole artel was responsible for defects in the work of any of its members. To apply such an idea to the American metropolitan Bar would be to invite the ruination of every worthwhile member. Yet almost the only people who really know the worth of a lawyer are his brethren. And the only way to make sure that their recommendations to non-friends are deeply sincere is by enlisting their own welfare in the recommendation. And the politics which lead to handing out patronage and even that share in the profits which goes with firm-membership are resisted even within the firm by quiet sabotage when it comes to entrusting the firm's business and reputation to a known or suspected dud-like senior partner's son-in-law in a responsible matter. And groups can build up the type of reputation in a metropolis which factories already have and which individualistic lawyers have been unable to. And whereas disbarment of the incom-

petent is unthinkable, the negative selection made familiar by Charles Darwin, applied by their own fellows, would force those same incompetents out of the practice, if they had group-reputations to compete against. It is a pretty fantasy: voluntarily formed artels, the members practicing on their own as now, taking new members only whom they trusted. A line of additional letters on the glass: "of the Marshall Artel."[19] A security afforded to the client, and known in advance, which no corporation could match. The policing done not by an over-worked grievance committee, or a character committee which has to move on inadequate evidence, at best on evidence of what a man looks like before his work begins; the policing done instead by a man's mates, on the basis of his performance in the game itself. No monopoly, within the trade, because new artels would be free to form; perhaps, to keep risk within reason, a limited group-liability could be set on any one claim. . . . But why dream on. It is too sensible ever to happen. It simply would fit the Bar, with due attention to the essentially individual nature of law-work (which the factory, for all its virtues, has tended to forget and to blur) into the industrial structure of today, and provide, to *any* client, as against lay competitors, that *assurance* of service which today is available in the metropolis only at the price of unflawed diamonds. It would settle any questions of reference lists. It would semi-automatically drive shysters out of practice. It would have the quality of any sound social organization, the enlisting of solid self-interest, clearly seen and clearly directed to the simultaneous welfare of Bar and public. Well . . . good-bye, Dream. . . .[20]

QUOTAS AND NUMBERS

The dream goes, the buggy remains, and with it the problem. The problem is to get new business flowing, and to keep it flowing. I have indicated my doubts as to how far blanket monopoly legislation against unauthorized practice can accomplish this. But another proposal comes to the fore which has its values: one can both reduce the percentage of incompetents (insofar as incompetence is correlated with

[19] *Artel*, or *Inn*, or *Guild*, or *Brotherhood* or what have you, so only the term can be, and be in fact, protected from piracy or use in misrepresentation—as a word like *Savings* is today. Even copyright might do it—though that would call for thinking through a most amusing set of problems.

[20] Consider, as the Dream departs, the Bonded Law List which finds so little favor with the Bar. After studying reports and canons, and listening, may one not say this? The Bar has not considered the question primarily from the angle of whether some type of Bonded List or its equivalent might provide greater security to a prospective customer, nor of whether providing such greater security might not open a greater flow of business to the Bar. In dealing with the Bonded List, the Bar's eye is less on the Bar's outcompeting the collection agency than on one lawyer's getting a headstart on another.

Yet the security afforded by a bonded list has value to the Bar at large. And one might start considering its use rather than its discouragement. The Canons and Resolutions I read do not seem to think of such things as an income pool from a bonded list—say, the first hundred dollars to any listed man, free to his own use, in absence of complaint; the second hundred fifty-fifty to the pool and him; thereafter thirds to the man, the pool, and the Bar, with the pool taking responsibility for what a lawyer shouldn't do. With listing accompanied by a contract to stay in the pool for a measured and fixed period. An outsider might find in this kind of thing a line of thinking which good thinkers get somewhere with. Present thinking seems concerned with whether a complaining customer will not be too easily satisfied, or a listed lawyer have too much chance to be engaged—in a word: it is lawyer-thinking, not Bar thinking. How, then, can a Dream remain around?

inexperience)—thereby furthering somewhat the whole flow—and one can also somewhat reduce the financial pressures on Bar members, by choking off the influx of new members. Moreover, it is a fair guess that admission quotas and *average* training and better talent (with the due percentage of exceptions) will, over the country, go hand in hand. I believe both to be somewhat inevitably on their way. And I believe their result will be, slowly and a little, to increase the Bar's competitive position as against the unauthorized. Yet I crave permission to round out the picture by briefly canvassing some of the features of this quota picture which are receiving less attention than they deserve.

The quota idea has two roots which tap quite different soils. The one, the bread-and-butter root, calls for no further discussion. The other does. It is the ideal of the lawyer as an American scholar and gentleman. It looks not only toward reducing the number of entrants, but toward eliminating a particularly high proportion of the candidates considered socially undesirable: Jews, radicals, uncouth prospective Lincolns; peculiarly and of necessity, boys who come from disadvantaged background. Any quota-administration, unaccompanied by the most careful checks, will work out that way. Now there are not many who believe as firmly as I do in the need for a lawyer being a gentleman of culture. But culture is an end-product, achieved as finely from bare feet and contact with good earth as from family background. Committees administering quotas *can* keep prejudice from working out misguided short-cuts; but not many Committees *will;* their enlisted self-interest runs the wrong way.

Now if there were nothing to law practice and the position of the lawyer but trying cases, a good deal might be said for frank caste organization: gentlemen only, with gentlemen's restraint and responsibility, as advocates. English experience shows that. But, quite apart from all the other aspects of law practice there is an extra and more vital factor: the way of our Bar is to make the Bar the main road into politics, and the way of our politics is to elect only from the district of the residence, and people are best represented by men who know from youth up the conditions of those people's lives. To represent folk politically one must be able to think not only for them, but with them. To limit the entrance of boys of disadvantaged background is therefore a political calamity. For this reason alone no quota-talk should be even listened to which is not coupled, as a check, with a wide program for Bar scholarships for the able disadvantaged.

But more important to our immediate subject is the relation of the quota to unauthorized practice. I take it as inescapable fact that over the long haul the only way to deal with unauthorized practice is to modernize lawyer's practice until lawyers can compete on moderately even terms. That calls for imagination, for energy, and above all for a burning sense of need to use brains and imagination. The job, moreover, of developing new fields of activity for the Bar is not one which can be done and dropped. It is on-going. But when social invention is in demand, it is not among the comfortable and well-adjusted that one looks first for the supply. The

men who are going to work out new lines of action for the Bar and to explore new areas for its service are the men with no connections, and, it may be, with few manners; men with their whole own way to make, but with brains. In these men, in the disadvantaged, in persons who seem in advance to be without 'background', but who have brains . . . seems to be at the present juncture and for decades to come the real hope for the future of the Bar entire. It is amusing.—But again, there are signs that the ablest of the Bar are opening their eyes, and *seeing*.

A last word before I close. No war on unauthorized practice, however well conducted, is going to accomplish soon, if at all, what most of the fighters in the trenches hope from it, nor yet what the generals may be hoping. That is no reason at all for not moving into battle; existence is at stake. But it is the lesser middle and the poverty-stricken classes in the Bar who utterly need business to do. In the metropolis, these are not the groups who will most profit from the mere elimination of unauthorized practice. Indeed, there would be considerable thinning or lifting of fog about the problem if talk about The Bar in this matter could be broken down, and we talked instead about *which* of the heterogeneous conglomeration of persons who happen to be lawyers the talker happens to be thinking of. Some of the worried lawyers who are moving against unauthorized practice have in mind the rent, or a job in law which might open, or a job affording pay enough to live on. Whereas some have in mind owning a Lincoln, though they have a Ford; such members couple vigilance against unethical practice within the Bar with their interest in monopolies for "The Bar"—and yet go on, many or most of them, *unaware* of the plain fact that these two lines of action plus nothing more mean only more income flowing where enough flows already, the decrease of service, and the contribution of nothing to the Bar's true need. Still others of the Bar—including most of its kings—have no defined attitude of either sort, except that the Bar is in trouble, and they are willing to take time off to do something about it. From none of these groupings, *if they think no further,* will come action other than the mustard-plaster and the Sure-Kure, while the patient's stomach-ulcer grows apace. Certainly all hope for the lesser middle and the near-paupers of the Bar lies in such measures as are suggested in this paper, in new business opened, and in new procedures for bringing together the lawyer and his possible client, in widening a market for what you may scoff at as Woolworth wares—which last, in law, too, can be very good indeed, and can be much sought after.

The other difficulty is this: let the economic condition of the Bar, at its low-income end, begin to improve materially and noticeably, and the tide of emigration will reverse itself. For decades now members of the Bar have been moving out—into business as sub-executives, into business as clerks, yes, more recently, into anything from driving taxis to elevator-running. Into government, all the way from dignified professional positions in the department of the Solicitor-General down into totally non-legal routine clerking. Into the police force, where physique has sufficed—and with good prospects, too. In result the Bar resembles the bituminous coal industry,

the working outfits hedged in on every side by little sub-marginal mines ready, each one, to open again at once the minute prices rise sufficiently. By all means, if we can, let us get the machinery set for feeding lawyers oftener and most of them a little better. But when word gets out that there is food at last, we shall find more members crowding to the table than we have cooked for. That is one reason for trying to so work the thing out that service results as well as food. Another reason is that we still are a profession.

THE CAVILLER AGAIN

"So," says the Cynic Caviller, "you want to reduce the Bar to a dishwashing kind of service, or a moving belt?"

This Caviller makes me feel sympathy with whomsoever I may have insulted by twisting words in his teeth. Where did I say, where did I suggest "reduce" the Bar to anything? I want to see it uplift itself. I want to see what *can* be routinized, and get that much actually routinized, so that good energy and good imagination are left over for the jobs that call for both. Did I say other?

"You duck me," says the Caviller, "but this one you won't duck: Debasing Our Profession Into Business! Pure Business. You said so!" Did I, now? Or did I say Business-*getting*, dealt with in modern-age intelligence; Production-costs lowered, where possible, as an Engineer would lower them; but Service given as it is possible *only for a Bar* to render service?

"You duck again," exclaims our Caviller. "You Professor! You Reformer!"

No, I am not reforming. I only have my binoculars, from the cloister walls, upon our team. Superb players, so many of them. They only lack teamplay, coach, quarterback and signals. They have no interference, they never heard of passing. And all our boys have bet their shirts upon the game. That's all.

* * * * *

Antiquated in organization, in methods of doing business, in methods of getting business, in nose for where its services are needed, the Bar finds its buggy crowded to the wall. Specialized business outfits show how to specialize, standardize, and lower price on many services; they offer assurance of moderate adequacy in their work; they are easy to find; they make themselves and their service known. In the great city the Bar's overhead is uselessly high, much of its field of work lies fallow, it has no machinery for coming together with its customers. Its own thinking about its own troubles is still primitively individualistic. The condition grows worse.

The Job does not grow worse, or dwindle. Steady, and beautiful, stands the Lawyers' Work, to do. Eternal. But, as things stand, too many crowd in to the doing, even while much of it goes undone. Unique among professions for the huge spread in income between its top and bottom ranks, the Bar finds its glittering peaks to lure the young; it is, moreover, the only profession in which enormous fees when they occur cannot be kept out of the news.

Quotas may help, but cannot cure; and they need careful watching. Monopoly legislation may poultice somewhat, but unless accompanied by roughly equivalent service rendered by the Bar, contains uncomfortable likelihood of boomeranging. Real progress toward cure lies in *group action* to reorganize the getting of business and the doing of it in keeping with the age: in standardizing, spreading, and lowering the price of service. *Once Service is sure,* the Bar can outpublicize any lay competitor—wherever its Service can itself compete; but let Service fail, and the flank attack that opens can cripple and kill.

No move along this line in any manner impairs the lawyer's ancient and lovely task of individualized counselling. It merely reduces to routine what can be so reduced. But it does call for group action. Group action calls for many men to think things through. Whereas the Bar is human. Human beings in pain do not want to think things through; they prefer to chase devils. They prefer an opiate or a poultice to a cure, while the cause continues causing. Doubtless such will be the preference of the Bar.

PROCEDURES FOR THE PUNISHMENT OR SUPPRESSION OF UNAUTHORIZED PRACTICE OF LAW

PAUL H. SANDERS*

Of the phenomena associated in recent years with the term "unauthorized practice of law," none are more striking than the procedural. The development of effective legal remedies for use against the unauthorized practitioner, and their adoption on a widespread scale, are, in the main, events of the present decade. Curiously, in this process, criminal prosecution, the one remedy with specific statutory authorization almost everywhere, has been passed by (or despaired of) and, instead, use has been made of more direct proceedings, frequently summary and extraordinary in their nature. Moreover, lawyers, in their search for better methods of meeting this problem, peculiarly their own, have fashioned, with the assistance of the courts, new devices even more direct and summary in their action than the remedies previously available. Not all the courts have displayed a willingness so to adapt their processes to the use of the campaign of the bar associations against unauthorized practice of the law, yet it is generally true that one interested in suppressing unauthorized practice will have a veritable arsenal of weapons at his disposal.

In this paper an inquiry will be made into the availability of the procedures[1] that have been used in the various states against unauthorized practice of the law, and, where considered helpful, something of the theory of the remedy and the mechanics of its operation in this particular field will be indicated. It is probable that a complete analysis of a remedy cannot be made without setting out in detail its application to the practice sought to be controlled, but that would make this paper coextensive with the entire field under consideration. Of necessity, therefore, the question of what constitutes "unauthorized practice of the law" must be left undetermined. The prob-

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[1] The term "procedures" is limited to proceedings instituted against a layman or lay agency because of alleged unauthorized activity. In a broader sense it might well include the questioning of the legal effect of acts of unauthorized practice and the withholding of compensation therefor, see cases collected in BRAND, UNAUTHORIZED PRACTICE DECISIONS (1937) 804, as well as the institution of disciplinary proceedings against attorneys who aid in such practice. *Id.* at 802. In a still broader sense it might include such extra-legal developments as negotiation and the entering into agreements by the bar and lay groups. See collection in HICKS AND KATZ, UNAUTHORIZED PRACTICE OF LAW (1934) Pt. III.

lem attacked by the paper may be stated: "assuming that unauthorized practice of the law exists, what are the procedures that may be used against it?"

CRIMINAL PROSECUTION

In 39 states it is provided by statute[2] that the practice of law[3] by one not licensed therefor is a misdemeanor. Criminal prosecution is thus established in undisputed preeminence as a remedy in this field, if legislative sanction is the criterion. In some instances these statutes contain, in addition to the general prohibition, separate criminal provisions with reference to practice by corporations,[4] and voluntary associations.[5] An attempt has been made in a few of the statutes[6] to define "practice of law," but usually no formal definition is undertaken. At times stress is laid upon such factors as the requirement that the forbidden acts must have been performed in a representative capacity,[7] or for fee or reward,[8] or as a business or vocation.[9] Exceptions and provisos are numerous and in some instances would appear to render the statute

[2] The statutes enacted prior to 1934 are collected in HICKS AND KATZ, *op. cit. supra* note 1, beginning at p. 15. Additional criminal provisions may be found in the following references: DEL. REV. CODE (1935) §195; IOWA CODE (1935) §12551; LA. GEN. STAT. (Dart, 1932) (Supp. 1937) §449.45; Ore. Laws 1935, c. 28, §25; PA. STAT. ANN. (Purdon, 1930) (Supp. 1936) §1610; R. I. Acts and Resolves 1935, c. 2190, §46, Clause D; Tenn. Pub. Acts 1935, c. 30, §2. The following states do not have a general criminal statute on the subject: Kansas, Montana, Nebraska, New Hampshire, South Carolina, South Dakota, Vermont, and Wyoming. Colorado has been classed under the states having a criminal statute, since it states that a violator of the act is subject to a fine recoverable in "any court of competent jurisdiction, in the name of the People of the State of Colorado." COLO. COMP. LAWS (1921) §6015. Penalties may be recovered in other than criminal proceedings. The Colorado statute provides in §6016 that, if a person who has paid an unauthorized practitioner does not bring suit to recover triple the compensation so paid, a *qui tam* action may be instituted for it—one half of the amount recovered to go to the person suing and the other half to the use of the county in which the suit is brought. A similar South Carolina statute is not so complex. A penalty of $500 is provided for each "cause" solicited by an unlicensed person—"one half to the state and the other half to him or them that will sue for the same." S. C. CODE OF LAWS (1932) §312. There is no record of any action having been instituted under either of these statutes.

[3] This term is used in a generic sense but it appears in most of the statutes. Variations include: "practice as an attorney at law" (Arkansas), "engage in the business of a practicing lawyer" (Indiana), "perform the services of an attorney at law" (Maryland). Most of the statutes contain similar prohibitions against an unlicensed person holding himself out as an attorney at law or as qualified to practice law. In Arizona the "holding out" must relate to practice in a court of record. ARIZ. REV. CODE (1928) §4568.

[4] ILL. REV. STAT. (1937) c. 32, §411; MASS. ANN. LAWS (1933) c. 221, §46; MINN. STAT. (Mason, 1927) (Supp. 1936) §5687-1(e); N. Y. CONSOL. LAWS (Cahill, 1930) c. 41, §280; R. I. Acts & Resolves 1935, c. 2190, §46, Clause D; TEX. PEN. CODE (Supp. 1934) art. 430a; UTAH REV. STAT. (1933) §6-0-39; W. VA. CODE (1932) §2854.

[5] GA. CODE (1933) §9-9903; LA. GEN. STAT. (Dart, 1932) §447; MICH. COMP. LAWS (1929) §10175; N. Y. CONSOL. LAWS (Cahill, 1930) c. 41, §280.

[6] ALA. CODE (Supp. 1932) §6248; GA. CODE (1933) §9-401; LA. GEN. STAT. (Dart, 1932) §443; MO. REV. STAT. (1929) §11692; ORE. CODE ANN. (1930) §32-505; TEX. PEN. CODE (Supp. 1934) art. 430a. A 1935 Rhode Island statute approaches the problem of definition in the following manner: "The term 'practice of law' . . . shall be deemed to mean the doing of any act for another person usually done by attorneys at law in the course of their profession, and, without limiting the generality of the foregoing, shall be deemed to include the following . . . [particular activities are then enumerated]." R. I. Acts & Resolves 1935, §45, Clause B.

[7] ALA. CODE (Supp. 1932) §6248; LA. GEN. STAT. (Dart, 1932) §443(a). Mo. REV. STAT. (1929) §11692; TEX. PEN. CODE (Supp. 1934) art. 430a; VA. ANN. CODE (1930) §3426a.

[8] ALA. CODE (Supp. 1932) §6248; LA. GEN. STAT. (Dart, 1932) §443(b); MD. ANN. CODE (Bagby, 1924) art. 10, §19; MINN. STAT. (Mason, 1927) (Supp. 1936) §5687-1; MO. REV. STAT. (1929) §11692; VA. ANN. CODE (1930) §3422.

[9] ALA. CODE (Supp. 1932) §6248; GA. CODE (1933) §9-402; TEX. PEN. CODE (Supp. 1934) art. 430a.

almost meaningless.[10] The penalty provided is usually not severe. Fines of up to $500 or imprisonment of up to six months would cover the punishment in most of the states, although in some instances the penalty is greatly increased when the offender is a corporation.[11]

The formalities attached to proceedings under these statutes do not seem to vary in any particular degree from those in criminal cases generally. One matter upon which the courts have divided concerns the sufficiency of the indictment. Two supreme courts have held that an indictment for illegal practice of law is sufficient in form if it charges the commission of a crime in the language of the statute.[12] The Delaware Court of General Sessions, however, sustained a demurrer to an indictment charging an offense in the language of the statute.[13] The accusation did not contain an averment that the defendant practiced law "for fee or reward," and the court regarded this as an essential element of the crime.[14]

While many of these enactments have been given a refurbishing recently, criminal laws of the same general nature have been on the statute books of most states for many years. It is somewhat surprising, therefore, to find only eighteen cases involving the application of these statutes in the reports of the appellate courts in this country.[15] Nothing in the decisions themselves is any more revealing concerning the use (and the availability) of this particular remedy than is an examination of the statistics based on these eighteen cases. The cases arose in eleven states, one to each

[10] See *infra* note 20.

[11] Rather there is possibility of the penalty being greatly increased. For example, corporate violators are susceptible to being fined up to $5000 under Louisiana and Utah statutes, while $1000 and $500 are the limits respectively for individuals. LA. GEN. STAT. (Dart, 1932) §§445, 447; UTAH REV. STAT. (1933) §§6-0-24, 6-0-39. Massachusetts and Rhode Island make provision for increased penalties for offences subsequent to the first. MASS. ANN. LAWS (1933) c. 221, §41; R. I. Acts & Resolves 1935, §45, Clause I.

[12] People v. Schreiber, 250 Ill. 345, 95 N. E. 189 (1911); State v. Chamberlain, 132 Wash. 520, 232 Pac. 337 (1925).

[13] State v. Adair, 4 W. W. Harr. 585, 156 Atl. 358 (Del. 1922).

[14] It is significant that where no fee has been charged the convictions have been reversed, although other factors were sometimes indicated as controlling the decision.

[15] Kendrick v. State, 218 Ala. 277, 120 So. 142 (1928) (conviction rev'd); People v. Ring, 70 P. (2d) 281 (Cal. App. 1937) (complaint held sufficient); State v. Adair, *supra* note 13 (demurrer to indictment sustained); People v. Schreiber, *supra* note 12 (conviction aff'd); People v. Hubbard, 313 Ill. 346, 145 N. E. 93 (1924) (conviction aff'd); People v. Goodman, 259 Ill. App. 667 (1931) (conviction rev'd); State v. Rosborough, 152 La. 945, 94 So. 858 (1922) (conviction aff'd); Commonwealth v. Grant, 201 Mass. 458, 87 N. E. 895 (1909) (conviction aff'd); McCargo v. State, 1 So. 161 (Miss. 1887) (conviction rev'd); People v. Peoples' Trust Co., 180 App. Div. 494, 167 N. Y. Supp. 767 (1917) (conviction aff'd); People v. Title Guarantee & Trust Co., 227 N. Y. 366, 125 N. E. 666 (1919), *rev'g* 180 App. Div. 648, 168 N. Y. Supp. 278 (1917) (conviction rev'd); People v. Alfani, 227 N. Y. 334, 125 N. E. 671 (1919), *rev'g* 186 App. Div. 468, 174 N. Y. Supp. 527 (1917) (conviction aff'd); People v. Title Guarantee & Trust Co., 191 App. Div. 165, 181 N. Y. Supp. 52 (1920), *aff'd*, 230 N. Y. 578, 130 N. E. 901 (1920) (conviction rev'd); People v. Goldsmith, 249 N. Y. 586, 164 N. E. 593 (1928), *rev'g* 224 App. Div. 707, 229 N. Y. Supp. 896 (1928) (conviction rev'd); People v. Weil, 237 App. Div. 118, 260 N. Y. Supp. 658 (1932) (conviction rev'd); State v. Bryan, 98 N. C. 644, 4 S. E. 522 (1887) (conviction rev'd); Dietzel v. State, 131 Tex. Cr. App. 279, 98 S. W. (2d) 183 (1936) (conviction rev'd); State v. Chamberlain, 132 Wash. 520, 232 Pac. 337 (1925) (demurrer to information overruled). Two other related New York decisions are not included in the statistics developed in the text. One is a county court decision, People v. Stoddard, 157 Misc. 153, 283 N. Y. Supp. 730 (1935), and the other involved an "ambulance-chasing" prosecution under a statute specifically covering such activity. People v. Meola, 193 App. Div. 487, 184 N. Y. Supp. 353 (1920).

state, except in Illinois and New York. Six of the eighteen decisions were by New York courts, three by the Court of Appeals and three by the Appellate Divisions. While extending over the fifty-year period from 1887 to 1937, only six of the cases have arisen since 1925, only two in the last five years. In eight cases the conviction was affirmed or the indictment was sustained against attack, but in ten instances the conviction was reversed or the indictment was quashed. Of the six cases since 1925 there have been two affirmances to four reversals. So much for the working of 39 criminal statutes if the reported decisions correctly reveals it.[16]

Some explanation of this state of affairs is in order but there is little to be gleaned from the cases on this point. When the Committee on Professional Ethics and Grievances of the American Bar Association surveyed the unauthorized practice scene in 1930, it noted both the existence and the non-use of the criminal statutes, but little was offered by way of elucidation except an innuendo that the situation might in some way be due to the baleful influence of "the large financial institution"—and a conjecture that there might be no public or professional demand for such enforcement.[17] However, the answers to the questionnaire on unauthorized practice sent out by the American Bar Association in 1934 indicated that the members of the bar at that time did not have any aversion to using the criminal proceeding and that they considered it to be an effective remedy.[18] But a desire by lawyers to see such proceedings instituted is no indication that anything will be done. It is not likely that the public, as a usual thing, will be interested in having these particular laws enforced, and the prosecuting attorney, furthermore, may consider such cases to be actually hurtful to him politically. In this connection, the following statement made by Charles A. Beardsley, then president of the California State Bar, is illuminating:

"I am aware that there are some who object to this method [negotiation] of approaching the problem. They think that the members of the board of governors should spend their time arresting the bankers, title men, real estate brokers, notaries, collection agents, corporation organizers and the members of the automobile clubs and associations. It is not clear just what they expect us to do with them after we arrest them. I am yet to find a district attorney who thinks he could get a jury of twelve laymen to convict another layman of a misdemeanor because he does the things of which we complain. I first tried the district attorneys in the larger cities. They thought it could not be done in the larger cities, but said that perhaps it could be done in the country towns. So I tried in the country towns, but with no better success. The last one I talked to was up in Del Norte County. There were six attorneys in the county and three of them were running for district attorney. I asked the district attorney if he thought he could get a jury of twelve laymen to convict a real estate broker who drew a deed or a chattel mortgage. He replied that he knew that he could not, and that he certainly was not going to try while he was running for office."[19]

[16] If a matter is seldom, or never, presented to the appellate courts of a state, usually it may be inferred that the lower courts are not being called upon to deal with it either. The possibility of there being any considerable body of unreported cases involving criminal prosecution of unauthorized practice of law seems precluded when an examination is made of the situation in New York where the lower court cases are reported and of the references in BRAND, *op. cit. supra* note 1 at 802.

[17] 55 AM. BAR ASS'N REP. (1930) 481. [18] 59 *id.* (1934) 535.

[19] Beardsley, *Lay Encroachments* (1931) 17 A. B. A. J. 189, 192.

But it may not be inability to goad the prosecuting attorney into action alone that has led the bar to look to other means than the criminal law to preserve its prerogatives. One imporant factor is the presence of numerous exceptions and provisos in the statutes.[20] While courts have declared these exceptions inapplicable in other types of proceedings,[21] that would be of no assistance in a criminal prosecution under the statute itself. Then, to, the criminal trial is encompassed with many "safeguards" for the accused, not present in some of the devices to which the lawyers have turned.[22] The presence of a jury with all the possibilities of a speech on the "lawyer-monopoly" theme, the opportunity for dilatory tactics and for appeals, the lack of relief against future misbehavior—all these factors keep this device from being particularly attractive to lawyers now, since they have fashioned effective weapons of another sort. Nonetheless, it may be noted that the criminal proceeding has been recommended recently by one bar association for "simple and clear" violations.[23] If much use is to be made of this proceeding it would seem desirable to furnish an adequate description in the statute of what is unlawful and what is not, both for constitutional and tactical reasons.[24] A popular understanding and appreciation of the lawyer's position

[20] An examination of the statutes referred to in notes 2 through 8 *supra* will reveal exceptions in favor of the following groups: banks and trust companies (Georgia and Texas), collection agencies (Georgia, Illinois, Maryland, and Minnesota), real estate brokers (Georgia, Maryland, Minnesota, and Rhode Island), title companies (Alabama, Arkansas, Georgia, Louisiana, Maryland, Michigan, Mississippi, New York, Texas, and West Virginia), insurance companies (Illinois, Maryland, Minnesota, North Carolina, and Texas), notaries public (Louisiana and Texas). The Minnesota statute also excepts trade associations, labor organizations, "legal columns" in newspapers, corporation service companies, and any activity "authorized under existing statutes." Legal aid organizations are specifically excepted in Arkansas, Georgia, Illinois, Louisiana, Michigan, New York, North Carolina, Rhode Island, and West Virginia.

[21] People *ex rel.* Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 8 N. E. (2d) 941 (1937); see *In re* Opinion of the Justices, 289 Mass. 607, 194 N. E. 313 (1935).

[22] See State *ex rel.* Wright v. Barlow, 271 N. W. 282 (Neb. 1937).

[23] By the committee of the New York State Bar Ass'n, referred to *infra* p. 155.

[24] In only one instance has an attack on the constitutionality of one of these criminal statutes been sustained. Kendrick v. State, *supra* note 15 (overruled, in effect, in Berk v. State, 225 Ala. 324, 142 So. 832 (1932)). In this case the title of the statute contained a reference to "practice of law," but the definition of this phrase in the body of the act included the making of ordinary collections out of court. It was held that the statute was invalid because not expository, and hence violative of the constitutional provision that each law should contain but one subject and that to be clearly expressed in its title. The court said that making collections out of court had nothing to do with the practice of law. An objection on a similar basis to an Illinois statute was overruled in People v. Schreiber, *supra* note 12. Here the title of the statute stated that it was an act to punish and prevent frauds in the practice of law. Pretending to be a licensed attorney was a fraud, in the court's opinion, and it added that any means "reasonably adapted" to secure the object stated in the title of a statute may without objection be incorporated in it.

The question of how far the statutes may go in making crimes out of conduct not usually regarded as criminal by laymen might have become a very important question if there had been a more extensive use of this remedy. Aside from the Alabama decision the strongest statement to the effect that there must be a clear and unequivocal expression of legislative intent to make acts criminal which are usually considered innocent is in the dissenting opinion of McLaughlin, J., in People v. Alfani, 227 N. Y. 334, 341, 125 N. E. 671, 674 (1919). The Supreme Court of Louisiana has refused to invalidate a statute of the sort under consideration, holding that there was no lack of "due process" or "equal protection." State v. Rosborough, *supra* note 15. It might be supposed that a statute which makes it a crime to practice law without a license without defining "practice of law" would run afoul of the familiar constitutional principle that a criminal statute should not be vague or uncertain. A California court met this argument by pointing to judicial decisions defining the practice of law prior to the enactment of the statute. People v. Ring, *supra* note 15. These definitions were deemed to be incorporated in the statute. The court said: "Words used in creating a statutory crime do not fail of such certainty [sufficient for a penal statute] merely because

to a much greater degree than presently exists would also seem to be a *sine qua non* of the effective development of criminal prosecution as a remedy against unauthorizd practice of law.

CONTEMPT PROCEEDINGS

If an unlicensed person appears in a court room in a representative capacity or if he acts (as an attorney) with reference to matters pending in the court even though not actually appearing there, it does not require an extended argument to demonstrate that either of these may be considered such an affront to the dignity and authority of the court as to constitute direct contempt.[25]

However, when it is stated that activities are contemptuous although in no way connected with proceedings in that court (and perhaps not with those in any court) then the reasoning is not so apparent, except, perhaps, in the case of the disbarred or suspended attorney who continues to practice.[26] It is against activities of this type, rather than with those relating to court proceedings, that most of the recent contempt proceedings in this field have been directed, and usually, it may be added, with success. There is authority to support the broad proposition that practice of law by unauthorized persons *no matter where engaged in* may be punished by contempt proceedings in the supreme court of the state,[27] in intermediate appellate courts,[28]

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the offense when viewed through them may not have all the precision in outline of a geometric figure; if the main and central part of the field is clear, some slight lack of definition around its outer edges is not fatal." Without disagreeing with this statement, one may feel that it is still not a complete answer for the man whose activity is near the "outer edges." The problem did not arise in earlier cases, perhaps because the scope of the prohibition was not considered to be so wide. It is probable that the criminal statutes were thought to be directed only at the person who deliberately acted as, or misrepresented himself to be, a licensed attorney. See People v. Schreiber, *supra*.

[25] See *infra*, p. 148.

[26] Logically, perhaps, no distinction can be made between practice of law by one who has never been licensed and one who has had his license taken away. *In re* Hittson, 39 Cal. App. 91, 178 Pac. 149 (1918). Compare with *In re* Lizotte, 32 R. I. 386, 79 Atl. 960 (1911). The thought has been expressed, however, that the erstwhile attorney is under a greater disability than the ordinary layman, who has not given positive evidence of his unfitness; hence the disciplined attorney could not practice even in those courts where (in that state) unlicensed persons could appear in a representative capacity. State *ex rel.* Patton v. Marron, 22 N. M. 632, 167 Pac. 9 (1917). In considering the application of the remedy it seems that one important distinction exists between practice by the disciplined attorney and by laymen. One has had an order of the court of which he has knowledge expressly directed at him; the other may never have come in contact with the courts at all or be aware that what he is doing is "practice of law." This distinction has not been taken in any of the cases, however. In any event it may be taken as well settled that practice of law by an "unfrocked" attorney is subject to a contempt proceeding in the court where the discipline was imposed because it amounts to a direct flouting of the court's order and a false representation that he is an officer of that court. People *ex rel.* Colo. Bar Ass'n v. Humbert, 282 Pac. 263 (Colo. 1929); State v. Richardson, 125 La. 644, 51 So. 673 (1910); *In re* Lizotte, 32 R. I. 386, 79 Atl. 960 (1911); *In re* Duncan, 83 S. C. 186, 65 S. E. 210 (1909); *In re* Sullivan, 265 N. W. 601 (S. D. 1936). The bases upon which the disbarred or suspended attorney is guilty of contempt in the trial and intermediate appellate courts are largely identical with the reasoning applied to other unauthorized practitioners in such instances. Bowles v. U. S., 50 F. (2d) 848 (C. C. A. 4th, 1931), *cert. denied*, 284 U. S. 648 (1931); Clark v. Reardon, 104 S. W. (2d) 407 (Mo. App. 1937); see *infra* pp. 147 and 148.

[27] People *ex rel.* Illinois State Bar Ass'n v. People's Stock Yards State Bank, 344 Ill. 462, 176 N. E. 901 (1931); Clark v. Austin, 101 S. W. (2d) 977 (Mo. 1937); State *ex rel.* Wright v. Barlow, 131 Neb. 294, 268 N. W. 95 (1936); Rhode Island Bar Ass'n v. Automobile Service Ass'n, 55 R. I. 122, 179 Atl. 139 (1935). Accord: *In re* McCallum, 186 Wash. 312, 57 P. (2d) 1259 (1936). *Contra:* Murphy v. Townley, 274 N. W. 857 (N. D. 1937).

[28] Clark v. Reardon, *supra* note 26.

and in courts of trial jurisdiction.[29] A closer examination of the statutes and cases should reveal the accuracy of this generalization.

Statutory Bases for Contempt Proceedings

In some states there is explicit statutory authority for holding unauthorized practitioners in contempt of court. These statutes may be restricted to court appearances or to acts which can be construed as assumption of the office of attorney of the particular court,[30] while other such statutes are sufficiently broad in their wording to cover the whole field of unauthorized practice of the law.[31] In Colorado, Idaho, Michigan, and New Mexico the unauthorized activity is declared to be contempt of the supreme court of the state and of the court of general trial jurisdiction in the district in which the activity occurs. In a Wisconsin statute which provides a criminal penalty there is recognition that an unauthorized practitioner is liable also to be punished "as for contempt."[32]

The most recent legislation in this field is the New York statute passed in 1937 which gives the Supreme Court control over all persons practicing or assuming to pracice law.[33] This is implemented by an amendment to the Judiciary Law, adding a new criminal contempt (number 7):

"The Supreme Court has power under this section to punish for criminal contempt any person who unlawfully practices or assumes to practice law; and a proceeding under this subdivision may be instituted on the Court's own motion or on the motion of any officer charged with the duty of investigating or prosecuting unlawful practice of the law, or by any bar association incorporated under the laws of this state."[34]

The reasons for the adoption of this statute in 1937 lies in the refusal of the New York courts to concede that their "inherent powers" extend to a control over the bar and the practice of law.[35] Since there seems to be a decided trend on the part of the courts to assert such powers, which are said to include the power to punish for contempt one who practices law unlawfully, there is not much likelihood that similar statutes will be sought elsewhere. Moreover, if the principal opinion in a recent Missouri case were considered controlling, such a statute might be declared uncon-

[29] *In re* Nat'l Title Co., BRAND, *op. cit. supra* note 1 at p. 438 (Fla. Circ. Ct. 1935).

[30] ARK. DIG. STAT. (Crawford & Moses, 1921) §601; COLO. COMP. LAWS (1921) §6017 (trial courts); IOWA CODE (1935) §12542; MD. ANN. CODE (Bagby, 1924) art. 26, §4; MONT. REV. CODES (Anderson & McFarland, 1935) §8943. It should be noted that there is an ambiguity in these statutes as in those with criminal provisions. What is forbidden might be construed to include only attempts at deliberate misrepresentation that one is a licensed attorney (most of the early cases involved conduct of this sort). On the other hand these statutes might be construed to include engaging in activities permitted only to licensed attorneys, although no attempt is made to deceive as to the status of the person so engaged. The cases have never given rise to a discussion of this matter.

[31] COLO. COMP. LAWS (1921) §6017; IDAHO CODE ANN. (1932) §3-104; MICH. COMP. LAWS (1929) (Mason's Supp. 1935) §§13586, 13588; N. M. ANN. STAT. (1929) §9-126; N. Y. JUD. LAW (Supp. 1937) §750.

[32] WIS. STAT. (1933) §256.30. A similar statutory recognition exists in Washington. WASH. REV. STAT. (Remington, 1933), §138-14.

[33] N. Y. JUD. LAW (Supp. 1937) §88.

[34] N. Y. JUD. LAW (Supp. 1937) §750.

[35] McCormick, *First Annual Report of the Proctor of the Bar of the Eighth Judicial District* (N. Y. 1937) 11.

stitutional as a legislative invasion of a field exclusively under the control of the judiciary.[36] Even in those states where the courts formerly looked to the statute as the basis of the contempt proceeding before them, apparently of late, as will be seen, there has been little stress laid on the existence of the statutes and there are intimations that the power exists in the absence of such a statute.[37]

Where unauthorized practice of law has been made contempt of the supreme courts by statute,[38] some of these courts have not felt it necessary under such circumstances to explain the theory of the remedy and why such a proceeding should be entertained in that court.[39] In one Colorado case, however, the contemnor who had not taken part in court proceedings anywhere urged that the statute was unconstitutional because it attempted to define and punish as contempt an act which could not be construed as, or by statute be declared to be, contempt.[40] The court answered his argument by stating that the rules, which it had made pursuant to its statutory power over admission to the practice of law, are, in effect, orders of the court that no one shall practice law in the state except upon compliance with such rules. Hence one who does is guilty of contempt as for violation of any order of the court.

The great stress laid on the court's "inherent power" over such matters in some of the recent decisions gives to the court's explanation for a proceeding clearly provided for by statute a somewhat old-fashioned air. This same court did not refer to the statute in its most recent decision,[41] and has remarked[42] that "in the absence of statute it would seem clear that one falsely representing himself as an officer of this court thereby committed contempt of this court."

The Montana Supreme Court in 1915 intimated that the basis of the statutory contempt proceeding lay in the court's power to license attorneys.[43] In 1937 the same court states that its jurisdiction to punish for contempt is based on the fact that by statute it has been given exclusive power to admit and disbar attorneys. The inference to be drawn is that the existence of the contempt statute had nothing to do with the decision in the case.[44]

[36] Clark v. Austin, *supra* note 27 (opinion of Frank, J.).

[37] People *ex rel.* Colo. Bar Ass'n v. Humbert, *supra* note 26; State *ex rel.* Freebourn v. Merchants' Credit Service, 66 P. (2d) 337 (Mont. 1937); see reference to the position of Morgan, J., dissenting, in *In re* Brainard, 55 Idaho 153, 157, 39 P. (2d) 769, 771 (1934).

[38] *Supra* notes 30 and 31.

[39] People *ex rel.* Colo. Bar Ass'n v. Erbaugh, 42 Colo. 480, 94 P. (2d) 349 (1908); *In re* Eastern Idaho Loan & Trust Co., 49 Idaho 280, 288 Pac. 157 (1930); *In re* Bailey, 50 Mont. 365, 146 Pac. 1101 (1915).

[40] People *ex rel.* Colo. Bar Ass'n v. Taylor, 56 Colo. 441, 138 Pac. 762 (1914).

[41] People *ex rel.* Comm. on Grievances of the Colo. Bar Ass'n v. Denver Clearing House Banks, 99 Colo. 50, 59 P. (2d) 468 (1936).

The Supreme Court of Colorado recently handed down four decisions in one day dismissing contempt proceedings brought by the attorney general against alleged unauthorized practitioners. People *ex rel.* Att'y Gen. v. Kimsey, 74 P. (2d) 663 (1937); People *ex rel.* Att'y Gen. v. Wicks, 74 P. (2d) 665 (1937); People *ex rel.* Att'y Gen. v. Jersin, 74 P. (2d) 668 (1937); People *ex rel.* Att'y Gen. v. Bennett, 74 P. (2d) 671 (1937). Reports of these decisions were not obtained in time to incorporate them in the text.

[42] People *ex rel.* Colo. Bar Ass'n v. Humbert, *supra* note 26.

[43] *In re* Bailey, *supra* note 39.

[44] State *ex rel.* Freebourn v. Merchants' Credit Service, *supra* note 37.

The Theory of Contempt Proceedings in the Absence of Statute

(a) In the State Supreme Courts.

The earlier cases involving contempt proceedings in the supreme courts in the absence of statute were against attorneys who had had their licenses revoked, but in 1924 in *In re Morse*[45] it was held that a layman, who gave legal advice and appeared in justice of the peace courts in connection with his collection business, was in contempt of the Supreme Court of Vermont for practicing law. The court speaks of this conduct as amounting to an "intruding into an office of this court," and "pretending to act under the authority of this court." After noting that there was neither constitutional nor statutory basis for the proceeding, the court stated that none was needed because it had been granted complete power (by the legislature) to admit to practice before the courts of the state. The power to punish an unauthorized practitioner for contempt, the court says, is a power reasonably appropriate and relevant to the granted power over admissions and therefore to be implied from it.

It will be observed that a statutory power over admission to the practice of the law has been set forth as the basis of contempt proceedings in all instances so far examined where an explanation has been forthcoming. The most remarkable development in this field, however, is that of the notion that the courts do not even need an express constitutional or statutory power over admissions to punish unauthorized practitioners for contempt, because inherently they possess full powers over admissions, disbarment, the practice of law and the administration of justice generally. The basis of these powers is usually attributed to constitutional provisions relating to the separation of governmental powers and the vesting of judicial power solely in the courts. All of the powers referred to are said to be included in this judicial power. Pushed to its logical extreme it would seem that this doctrine would invalidate any statute dealing with these matters, even though in aid of the court's powers.[46]

The courts in Illinois and Missouri have been most influential in the development of this doctrine, and the decision of the Supreme Court of Illinois in *People ex rel. Illinois State Bar Association v. People's Stock Yard State Bank*[47] in 1931 has won recognition as the leading case on the subject. For this reason an extensive summary of the court's reasoning will be given. The bank contended, first, that those original proceedings which might be entertained in the supreme court were enumerated in the state constitution and, since nothing was said there with reference to contempt, the court had no jurisdiction in this case; second, that participation in trial court proceedings was not contempt of the supreme court; and, third, that performance of services of a legal nature outside of court was not contempt of any court. In its answer to the first of these contentions the court, in effect, answers all of them. Reference is made to the fact that the state constitution vests judicial power solely in the courts and that this includes all powers necessary for complete performance of

[45] 98 Vt. 85, 126 Atl. 550.

[46] See Clark v. Austin, *supra* note 27.

[47] 344 Ill. 462, 176 N. E. 901.

the judicial functions. Power over the admission and discipline of attorneys is necessarily implied from this grant of judicial power since attorneys are officers of the court and, in effect, part of the judicial system of the state.[48] The court states that it has exercised without question original jurisdiction over proceedings relating to admission and disbarment (even though such proceedings were not enumerated in the constitutional provision upon which the bank was basing its contentions), and no distinction can be made between such proceedings and one against an unauthorized practitioner. In elaborating upon this point the court says:[49]

". . . Having inherent and plenary power and original jurisdiction to decide who shall be admitted to practice as attorneys in this state, this court also has all the power and jurisdiction necessary to protect and enforce its rules and decisions in that respect. Having power to determine who shall and who shall not practice law in this state, and to license those who may act as attorneys and forbid others who do not measure up to the standards or come within the provisions of its rules, it necessarily follows that this court has the power to enforce its rules and decisions against offenders, even though they have never been licensed by this court. Of what avail is the power to license in the absence of power to prevent one not licensed from practicing as an attorney? In the absence of power to control or punish unauthorized persons who presume to practice as attorneys and officers of this court the power to control admissions to the bar would be nugatory. And so it has been held that the court which alone has authority to license attorneys, has as a necessary corollary ample implied power to protect this function by punishing unauthorized persons for usurping the privilege of acting as attorneys. [The court then cites *In re Morse*[50]]."

With reference to unauthorized appearances in trial courts the court observes that the fact that such conduct is punishable as contempt by these courts does not mean that their jurisdiction is exclusive in this respect. It is contempt of the supreme court also, since the wrongdoer has usurped a privilege solely within the power of the latter court to grant. The court then goes on to point out that its previous observations should be sufficient to dispose of the contention that it has no power to punish for contempt for acts not committed in any court. Much of the practice of law is outside of any court and has nothing to do with court proceedings. Hence it is just as much "usurpation" to engage in this phase of the practice of law without obtaining a license from the supreme court as it is to participate in court proceedings.

The court has had occasion to reassert as "well-settled" the doctrine announced in this case on several occasions[51] but there has been no reexamination of the basis of the court's power. Since this power is implied from an implied power, one may be allowed to wonder to what extent this process might be carried.[52] The supreme

[48] The court relies heavily on *In re* Day, 181 Ill. 73, 54 N. E. 646 (1899), in which the doctrine of the court's inherent power over admission to the practice of law had been vigorously asserted.

[49] 344 Ill. 462, at 471, 176 N. E. 901, at 906. [50] *Supra* note 45.

[51] People *ex rel.* Courtney v. Ass'n of Real Estate Tax Payers, 354 Ill. 102, 187 N. E. 823 (1933); People *ex rel.* Chicago Bar Ass'n v. Motorist's Ass'n, 354 Ill. 595, 188 N. E. 827 (1933); People *ex rel.* Chicago Bar Ass'n v. Chicago Motor Club, 362 Ill. 50, 199 N. E. 1 (1935); People *ex rel.* Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 8 N. E. (2d) 941 (1937).

[52] On the general subject of the inherent powers of the courts, see Dowling (1935) 21 A. B. A. J. 635, and the debate between Charles A. Beardsley and Amos C. Miller (1933) 19 A. B. A. J. 509, 616, 728; (1934) 20 A. B. A. J. 26, 124.

courts of Nebraska and Rhode Island have found a similar basis for punishing the unauthorized practitioner for contempt.[53]

The Supreme Court of Missouri has made many important pronouncements on this subject of inherent power of the courts over the practice of law. The establishment of its control over this field dates from *In re Richards,*[54] a 1933 case involving admission to practice. Separation of powers and the implications of a full grant of judicial power to the courts were the foundations of the doctrine announced in that case. Hence it is not surprising that the court did not trouble to set forth in detail the basis of its power to punish an unauthorized practitioner for contempt when such a proceeding was brought before it for the first time.[55] The case developed rather into an extended argument over the meaning of separation of powers and the status of legislation which touches on the practice of law.[56]

Some supreme courts have failed to see that they possess powers sufficient to allow them to entertain contempt proceedings against unauthorized practitioners, even though a constitutional provision similar to that in Illinois and Missouri with reference to separation of governmental powers is present. Bar association committees, however, have met rebuffs of this nature on only three occasions.

The Supreme Court of Indiana dismissed a contempt proceeding which had been brought against a trust company on the relation of the Indianapolis Bar Association on a somewhat technical basis, but it can clearly be inferred from the court's opinion that it would not be disposed to favor such a proceeding in any event.[57] The respondent trust company had filed a verified response to the bar association's charge, denying under oath any intention to violate the law, any order of the court, or any intention to practice law. It was held that this "purged" the contempt if any existed.[58] The court said that since it was at least debatable whether the respondent "practiced law" or not the question of intention to do so became material. It is intimated that if what is charged is unambiguous this doctrine would not apply.

[53] State *ex rel.* Wright v. Barlow, 131 Neb. 294, 268 N. W. 95 (1936); Rhode Island Bar Ass'n v. Automobile Service Ass'n, 55 R. I. 122, 179 Atl. 139 (1935). The Supreme Court of Washington has stated that it possesses such power because of its control over admissions, but no attempt was made to pursue the matter further. *In re* McCallum, 186 Wash. 312, 57 P. (2d) 1259 (1936). Presumably, the Supreme Judicial Court of Massachusetts would consider that it had this power. See *In re* Opinion of the Justices, *supra* note 21.

[54] 333 Mo. 907, 63 S. W. (2d) 672.

[55] Clark v. Austin, *supra* note 27.

[56] In the principal opinion Frank, J., states that the separation of powers clause must be literally interpreted and that, consequently, any such statutes are void for infringing on judicial power. Ellison, C. J., (with whom a majority of the court concur) announces that the court may punish for contempt where there is a violation of a statute dealing with unauthorized practice. See Howard, *Control of Unauthorized Practice before Administrative Tribunals in Missouri* (1937) 2 Mo. L. REV. 313. Usually this matter is settled by those courts which stress inherent power by a statement that the legislature under the police power, may enact reasonable statutes in aid of the courts. See People *ex rel.* Illinois State Bar Ass'n v. People's Stock Yards State Bank, *supra* note 47; Rhode Island Bar Association v. Automobile Service Ass'n, *supra* note 53.

[57] State *ex rel.* Indianapolis Bar Ass'n v. Fletcher Trust Co., 5 N. E. (2d) 538 (Ind. 1937).

[58] An Indiana statute provided for this "purging" in the lower courts but the application of this doctrine in the Supreme Court was on the basis that it constituted part of the common law of contempts. For a discussion of this case see (1937) 5 DUKE B. A. J. 106.

While this approach gave the Indiana court a basis for distinguishing cases in other states (where "purgation" was not permitted) nonetheless there is clear indication that the court is in basic disagreement with those tribunals which have held unauthorized practitioners in contempt. These activities that are charged against the trust company are not regarded as being in "actual contempt" of the court and it is only to such cases that the inherent power of the court to punish for contempt is said to extend. The power which had been given by statute to the court over admissions to the bar does not, in the court's opinion, embrace unauthorized practitioners.

"This court has no jurisdiction over one who is not a member of the bar and who is practicing law to punish him for contempt except for some act which affects or interferes with the functioning of this court [because of the existence of a criminal statute providing a penalty for illegal practice of law] . . ."[59]

It is apparent from this that the court has a much more restricted idea as to what constitutes "interference" with its functioning than do the courts in Illinois and Missouri, for example. The existence of a criminal statute is given an importance not usually attached to it.[60] As a final blow the court points out that, in any event, the relators are not properly in court even for a contempt proceeding.[61] However, the court would have so many bases upon which to distinguish this case if it felt inclined to do so in the future that it need not necessarily be inferred that contempt proceedings against unauthorized practitioners are forever barred in the Supreme Court of Indiana.

In the case of *In re Frederick Bugasch, Inc.*[62] the Supreme Court of New Jersey does not make it exactly clear whether it considers that it does not possess the power to punish the unauthorized practitioner for contempt, or that it has the power and is simply reluctant to use it. It is obvious from a reading of the case that the complaining bar associations made strenuous efforts to show the court that it had jurisdiction over contempt proceedings against unauthorized practitioners and to impress it with the importance of the nationwide campaign against unauthorized practice of which that proceeding might be considered a part. The decision indicates that the court remained unimpressed. The court seems to look at the proceeding as brought by lawyers on behalf of lawyers, and it points out that a charge of illegal practice is a criminal charge (the existence of a criminal remedy being stressed) which affects the public as well as lawyers.[63] The court concluded:[64]

"While the court is, of course, impressed and concerned with the efforts of all and particularly those of the bar associations, which have for its purposes the vindication and preservation of its powers, for they are wholesome and praiseworthy objectives, nevertheless we are of the opinion that we should not resort to or exercise the inherent, but none the less drastic and extraordinary, power and right of this court to punish, under all

[59] 5 N. E. (2d) 538, at 543.
[60] See *infra* p. 154.
[61] See *infra* p. 151.
[62] 12 N. J. Misc. 788, 175 Atl. 110 (1934).
[63] It might be noted that some courts on the basis of a similar line of reasoning have reached the conclusion that they should protect the public interest by entertaining contempt proceedings. See, *e.g.*, Clark v. Reardon, *supra* note 26.
[64] 12 N. J. Misc. 788, 791, 175 Atl. 110, 111.

circumstances, those who appear to have committed an act or acts which may be construed as being in contempt of court. It is a power that is not and should not be exercised lightly.

"We are not, under the facts and circumstances of the instant case, inclined to exercise or resort to the mighty power of this court to punish the alleged wrongdoers by and through the process of contempt proceedings."

Probably the most unequivocal renunciation of the whole basis of contempt proceedings in this field is contained in the decision of the Supreme Court of North Dakota in *Murphy v. Townley*.[65] This court states that, even if the defendants in the case are practicing law without having obtained a license, it has no power to punish them for contempt because there is nothing in the statutes on civil and criminal contempt which deals with this sort of activity. The court's disavowal of power over this subject matter is made more significant by the fact that power to admit to the practice of law was vested in the court by statute, and that "judicial power" was vested by the state constitution in all the courts of the state. The court considers the separation of powers doctrine as having validity but says that "judicial power" requires legislation in many cases to carry it into effect. Without the benefit of such legislation the court could punish only those acts which were understood to be contempt of court at the time when the constitution was adopted. Any subsequent extension of this field must have a statutory basis, the court says, because of the constitutional provision that the legislature "shall pass all laws necessary to carry into effect the provisions of this constitution." Speaking further of its "inherent" powers the court says:[66]

"The inherent power of the court to punish for contempt is exercised to prevent the obstruction of the course of justice, to prevent prejudice to the trial of any action or proceeding then pending in court. The court is created for the administration of justice through matters coming before it, and anything which interferes with or obstructs the work of the court is within the inherent power of the court to punish. But this power is not to be extended by the court beyond this field. It is often difficult to place the dividing line. The court would be derelict in its duty and false to the defense of the judicial power vested in it by the Constitution if it did not exercise this inherent power on all proper occasions. On the other hand, the court must be careful to see that power so lodged in the court is not extended unduly. The inherent power to punish for contempt does not extend beyond those matters that clearly tend to the obstruction of the course of justice."

(b) In Intermediate Appellate Courts.

Only one case has presented the question of the jurisdiction of an intermediate appellate court over a contempt proceeding against one who is charged with unauthorized practice in the geographical area covered by the court.[67] In this proceeding before the Kansas City Court of Appeals in Missouri there was no question of actual court appearance by one not licensed or of any activity in connection with a case pending in the court—these are said to be clear cases of direct contempt because

[65] *Supra* note 27. [66] 274 N. W. 857, 861.

[67] Clark v. Reardon, *supra* note 26. It may be surmised that Mr. Clark brought this action for the purpose of establishing the point that an action of this sort could be entertained by such a court. Certainly he was not forced to do so by an unfriendly atmosphere in the Supreme Court or trial courts in Missouri.

of the fraud and usurpation. However, the court asserts that unauthorized practice within the "territorial presence" of the court is contempt of it, because, subject to the power of the Supreme Court, it has power to regulate and control the practice of law within its jurisdiction. The fundamental principle is, the court says, that it has inherent power to guard the administration of justice in its jurisdiction. This includes superintending control over inferior courts including the bar of such courts.[68] It is interesting to note that the court here had to establish its power without being possessed of any control over admission to practice. It was claimed that the court's power to entertain and adjudicate disciplinary proceedings against attorneys in its district was precedent for the stand taken in this case. This on the theory that such power was part of the larger power to "guard the administration of justice" in the court's jurisdiction.

(c) In Trial Courts.

Some reference has already been made to the more common type of contempt proceedings which arise in connection with courts of ordinary trial jurisdiction. Appearances in such courts or activity in connection with suits pending therein by one not licensed to practice are usually considered direct contempt of the court and punishable as such.[69] The reason usually given is that such activity amounts to an imposition and fraud upon the court. The false representation to the judge of the court that the unauthorized practitioner is a duly admitted attorney is the basis upon which the courts usually proceed; however, there has been at least one case where it is doubtful if there could be said to be any such false representation.[70] In this case the party, a rental agent, was held in contempt for violating a statute requiring that only attorneys appear in the court in a representative capacity. He had brought an eviction proceeding in his own name and was appearing *in propria persona.* An attorney intervened in the suit, moved that it be dismissed and that the plaintiff be held in contempt. This motion was granted, the court making no examination of its power to punish this conduct as contempt.

The more difficult problem is presented when an attempt is made to bring contempt proceedings in a trial court for alleged unauthorized practice in the court's jurisdiction though not in the actual presence of the court. As we have seen the question is settled by statute in some states.[71] It is sometimes asserted as a general proposition of law that inferior courts cannot punish for constructive contempts where civil rights are not involved but the point apparently has not been passed upon directly in an unauthorized practice case by an appellate court in any state.[72]

[68] The court further asserts inherent power to determine what constitutes contempt as well as absolute freedom in punishing therefor.

[69] Bowles v. U. S., *supra* note 26; Heiskell v. Mozie, 82 F. (2d) 861 (App. D. C. 1936); People v. Securities Discount, 361 Ill. 551, 198 N. E. 681 (1935).

[70] Heiskell v. Mozie, *supra* note 69.

[71] *Supra* p. 141. The use that has been made of such a statute in Michigan is revealed by the references to lower court decisions collected in BRAND, *op. cit. supra* note 1, at 800.

[72] See *Ex parte* Wilkey, 233 Ala. 375, 172 So. 111 (1937). The issues involved are almost identical with those which arise in connection with the powers of court investigating committees. See *infra* p. 169.

In a concurring opinion delivered in a case involving an injunction proceeding against unauthorized practice,[73] Judge Burch of the Supreme Court of Kansas made some statements which have had a great deal of influence in stimulating local courts to act in the manner under consideration. His remarks are applicable not only to a trial court's power to entertain contempt proceedings, but to any method of procedure against unauthorized practice of law. He said:

"I concur in the result, and, treating the case as an injunction action between Depew and others as plaintiffs against the credit association as defendant, the case is well decided. My view, however, is that in essence and substance this is not an action at all. Under the fiction and form of an action between adverse parties, it is a special proceeding relating to the subject of unlawful practice of law.

"It would have been just as well if Mr. Depew had risen in court some morning and had asked leave to file written charges that the credit association was practicing law without license. Leave to file being granted, the court would have caused citation to be issued and served, and would have fixed time to plead. If, after a hearing, the court should find the charges to be true, an order to desist would follow.

"The duty of an attorney to bring such a subject to the attention of the court and the authority and duty of the court to take cognizance of the subject are undoubed. In this instance, charges were made which the court has entertained. The accused is before the court in response to the charges, and I regard the whole subject of remedy by injunction as unimportant."[74]

In a proceeding filed in the Superior Court of Los Angeles County, the State Bar of California sought to have certain adjusters declared in contempt of court for practicing law without a license. The court dismissed the proceedings on the ground that the facts set forth did not show a contempt of court, in that it was not charged that anything had been done in the presence of the court or in relation to a suit pending before it. The State Bar then sought a writ of mandamus in the Supreme Court of the state to compel the Superior Court to exercise its jurisdiction and determine after a hearing whether the acts complained of constituted contempt of court. The Supreme Court held[75] that the dismissal of the contempt order was final and not reviewable by mandate (or, apparently, by any other means). This decision, of course, does not constitute an authority sustaining the rectitude of the trial court's position.

A Florida Circuit Court[76] has passed directly on the matter and has asserted that it may adjudge a corporation in contempt of court for engaging in the practice of law within the territorial limits of the court although outside its presence. The court concludes that its holding in this regard is in keeping with the "well-established" rule

[73] Depew v. Wichita Retail Credit Ass'n, 141 Kans. 481, at 487, 42 P. (2d) 214, at 218 (1935).

[74] In the opinion of the Kansas court in State *ex rel.* Boynton v. Perkins, 138 Kans. 899 at 906, 28 P. (2d) 765, 769 (1934) (*quo warranto* proceedings against an unauthorized practitioner), the following language, which appears to be relevant in this connection, appears: "The form in which the matter is called to the court's attention is not so important. Since the court has jurisdiction of the subject matter, any recognized procedure by which a charge or complaint is entertained, and the one charged is given proper notice, and in which there is a full hearing fairly conducted, would appear to be sufficient."

[75] State Bar of California v. Superior Court, 4 Cal. (2d) 86, 47 P. (2d) 697 (1935).

[76] *In re* Nat'l Title Co., *supra* note 29.

laid down in the *People's Stock Yards Bank* case.[77] The facts that that rule was announced by a court of last resort in a proceeding before it, and that the reasons advanced for the rule could have little applicability, if any, in a trial court were not considered. However, the court states that it is impressed by the language of Judge Burch[78] and, if it is conceded that his words are authoritative, the court has here a much more logical basis for its approach.[79]

If the higher courts feel inclined to allow the trial courts to develop the notions that they have inherent power over the administration of justice in their jurisdiction and that it is their duty to protect by summary action the public interest whenever and however it is threatened, then there may be a great increase in proceedings of this nature, and, conceivably, in fields other than the one with which we are now concerned. One supreme court has rather bluntly rejected the idea that such courts do have any inherent power and authority to protect the public from unauthorized practice of law,[80] stating that it is their business to try cases according to the usual procedures established by the common law. If it is successfully maintained that the trial courts have the broad powers claimed by the Florida court, it is likely to be on the basis of the constitutional provisions concerning separation of powers and the vesting of judicial power in the courts. It might be asserted that the lower courts are thereby given full judicial power as well as the higher courts, and that the only restraint on such power is that it is subject to the exercise of the same power by intermediate appellate courts, and courts of last resort. This would be the logical development of the reasoning advanced in *Clark v. Reardon*.[81]

Another basis, somewhat related to this, is the theory that an unauthorized practitioner within the jurisdiction of the court is, in effect, representing himself as an "officer" of that court, because, he engages in activities that only licensed attorneys can engage in. Hence he may be punished for contempt for this "false representation."

Questions Encountered in the Use of the Remedy.

(a) Relating to Procedure.

A preliminary question of procedure in contempt proceedings is the matter of the identity (or the materiality of the identity) of the complaining or instigating parties. Logically, if a particular activity is considered to be contempt of a court then it should not matter how, or through whom, the court receives information concerning the activity. Of course, as to acts in the court's presence no complainant at all need

[77] *Supra* note 47. [78] *Supra* note 73.

[79] The Supreme Court of Florida has, by rule, authorized the circuit courts to establish commissions to investigate the professional misconduct of attorneys. Petition of Jacksonville Bar Ass'n, 125 Fla. 175, 169 So. 674 (1936). In a recent decision denying the major portion of a petition of the Florida Bar Association that the bar of the state be integrated by rule, the court states that members of the bar and bar associations can secure ample relief against unauthorized practice of law, "if the fact is brought to the attention of the courts in appropriate proceedings" (1938) 12 FLA. L. J. 8, 14. This, of course, still leaves the propriety of the contempt proceeding an open question.

[80] *Ex parte* Wilkey, *supra* note 72. [81] *Supra* note 26.

appear—the court may institute the suit of its own motion.[82] In one such case, however, an individual attorney was allowed to intervene in a suit in a trial court, and on his motion, the plaintiff was punished for contempt because of illegal practice.[83]

As might be expected, the courts have not made any distinction on the basis of the identity of the complaining party when the alleged contemptuous behavior took place outside of the court's presence. Contempt proceedings have been instituted by the attorney general of the state either on his own initiative[84] or at the suggestion of someone else such as the court itself,[85] or individual attorneys.[86] A local prosecuting attorney has instituted such a proceeding in one instance.[87] Bar associations, both state[88] and local,[89] and the officers[90] and committees[91] of such associations have instituted such proceedings. The board of commissioners of an integrated state bar,[92] and the president of such a board[93] have taken this action. Individual attorneys with no particular official status have likewise succeeded.[94] In two instances where the proceedings have failed, however, a point has been made of this matter. The Indiana Supreme Court said that contempt proceedings must be filed as an independent action and prosecuted in the name of the state.[95] This would indicate that a proceeding on the relation of a local bar association as in this instance would never be entertained in that court. The New Jersey case previously referred to[96] did not say that the complaining bar association and conference of bar associations had no standing, but, obviously, the court treated the action as if the complainants were parties having a private interest in the matter and that the proceeding was to protect it. The case names indicate that almost every conceivable style has been followed, without question, in the title of the cases. Only the Indiana court has made any point of the matter, stating that the cases must be entitled "State of Indiana v. ————."[97]

[82] Bowles v. U. S., *supra* note 26; Lapique v. Superior Court, 68 Cal. App. 407, 229 Pac. 1010 (1924); *In re* Lizotte, *supra* note 26. [83] Heiskell v. Mozie, *supra* note 69.

[84] State *ex rel.* Freebourn v. Merchants' Credit Service, *supra* note 37; State v. Richardson, *supra* note 26; State *ex rel.* Wright v. Barlow, *supra* note 53; *In re* Duncan, *supra* note 26; *In re* Ripley, 191 Atl. 918 (Vt. 1937).

[85] People *ex rel.* Attorney General v. Castleman, 88 Colo. 207, 294 Pac. 535 (1930); State *ex rel.* Patton v. Marron, *supra* note 26.

[86] *In re* Bailey, 50 Mont. 365, 146 Pac. 1101 (1915); *In re* White, 54 Mont. 476, 171 Pac. 759 (1918).

[87] People *ex rel.* Courtney v. Ass'n of Real Estate Tax Payers, 354 Ill. 102, 187 N. E. 823 (1933).

[88] People *ex rel.* Illinois State Bar Ass'n v. People's Stock Yards State Bank, *supra* note 47; People *ex rel.* Colo. Bar Ass'n v. Taylor, *supra* note 40; People *ex rel.* Colo. Bar Ass'n v. Erbaugh, *supra* note 39; People *ex rel.* Colo. Bar Ass'n v. Humbert, *supra* note 37; *In re* McCallum, *supra* note 27.

[89] People *ex rel.* Illinois State Bar Ass'n v. People's Stock Yards State Bank, *supra* note 47; and People *ex rel.* Chicago Bar Ass'n v. Motorists Ass'n, People *ex rel.* Chicago Bar Ass'n v. Chicago Motor Club, People *ex rel.* Chicago Bar Ass'n v. Goodman, all *supra* note 51.

[90] *In re* Brainard, *supra* note 37. Mr. Boyle Clark's position as General Chairman of the Bar Committees of Missouri is unique. His official position seems to be more closely related to the courts than to any organization of the bar. He has instituted proceedings in Clark v. Austin, *supra* note 27, and Clark v. Reardon, *supra* note 26.

[91] Rhode Island State Bar Ass'n v. Automobile Service Ass'n, *supra* note 53; People *ex rel.* Committee on Grievances of the Colo. Bar Ass'n v. Denver Clearing House Banks, *supra* note 41.

[92] *In re* Mathews, 62 P. (2d) 578 (Idaho 1936). [93] *In re* Brainard, *supra* note 37.

[94] *In re* Eastern Idaho Loan & Trust Co., 49 Idaho 280, 288 Pac. 157 (1930); Wayne v. Murphey-Favre & Co., 56 Idaho 788, 59 P. (2d) 721 (1936).

[95] State *ex rel.* Indianapolis Bar Ass'n v. Fletcher Trust Co., *supra* note 57.

[96] *In re* Bugasch, *supra* note 62.

[97] State *ex rel.* Indianapolis Bar Ass'n v. Fletcher Trust Co., *supra* note 57.

It is common learning that a court may summarily convict and punish for contemptuous acts in its presence without any preliminary complaint or affidavit. Presumably a court appearance by an unauthorized person would fall in this class[98] but a federal decision indicates that a trial court is not entirely unrestrained in such an instance. In this case the court held that an order providing that a person is to be punished for contempt must state facts to show that the court had jurisdiction to enter such an order.[99] The defendant in this instance had been adjudged in contempt of a federal district court for representing himself to the court as an attorney when in fact he had been disbarred. The Circuit Court of Appeals stated that there could not be a summary conviction of this sort unless the court is disturbed or has *legal* knowledge of the facts involved. The case was reversed and remanded because the court could not *know* that the respondent had been disbarred until so informed in a regular proceeding.[100] The lower court then changed its procedure to conform to the opinion, the respondent was again convicted and this conviction was sustained.[101] A California decision held a contempt order invalid in a somewhat similar situation on the ground that it did not contain a recital that the respondent was not licensed to practice law.[102]

Since most contempt proceedings for unauthorized practice must make use of the theory of the indirect or constructive contempt, the general rule that proceedings against such contempts must be based on petition (variously denominated affidavit, complaint, information, and the like) is followed, as is the requirement of notice and hearing in connection with the complaint. So far as the steps in a constructive contempt case can be generalized their outline would be: (1) requesting the court for leave to file an information charging that some unauthorized person has committed certain acts constituting contempt of the court (2) granting the leave, (3) filing of the information, (4) filing and disposal of motions with reference to the sufficiency of the information, (5) issuing a show cause order to the alleged contemnor, (6) answer by the contemnor, (7) determination of the facts—either by the court or a referee, (8) issuance of the court's order based on findings of fact and conclusions of law.

It has been stated by the Supreme Court of Idaho that the petition alleging facts upon which the proceeding is to be based must be verified under oath and that an allegation "on information and belief" is insufficient to support such a proceeding that may be called "quasi-criminal" in its nature.[103] In a case decided several years later by the same court a petition in which the allegations were in effect based upon "information and belief" was held to be sufficient.[104] The court strives for a nice distinction between the two cases on this point. In the first case the allegations were

[98] Heiskell v. Mozie, People v. Securities Discount Corp., both *supra* note 69.
[99] Bowles v. U. S., 44 F. (2d) 115 (C. C. A. 4th, 1930).
[100] It does not seem likely that most state courts would adhere to such a meticulous approach.
[101] Bowles v. U. S., *supra* note 26.
[102] Lapique v. Superior Court, *supra* note 82.
[103] *In re* Eastern Idaho Loan & Trust Co., *supra* note 94.
[104] *In re* Mathews, *supra* note 92.

prefaced with "the affiant is informed and believes that . . ." and "that affiant states that in his opinion . . . ." The approved form in the second case took this approach "that your affiant is informed and believes and therefore alleges the fact to be that . . . ." It was stated in the *Fletcher Trust Company* case[105] that facts in an information charging criminal contempt must be verified by oath on the personal responsibility of the relator and are not to be stated "on information and belief."

The contempt in these cases is said to be criminal as distinguished from civil because the dignity and authority of the court itself is involved rather than the rights of private parties.[106] This distinction has not been of any particular importance in these decisions, except that it has led to some discussion of the extent to which the "safeguards" in an ordinary criminal proceeding carry over to a proceeding of this sort. Contempt proceedings have been referred to as "quasi-criminal"[107] and "in the nature of a criminal proceeding" but in the same case it is made emphatically clear that there are vast differences between the two proceedings and that contempt is really *sui generis*. Although the opinion states that contempt is governed by the strict rules applicable to criminal proceedings,[108] yet the court does not hesitate to deny the alleged contemnor the right of jury trial,[109] the right to claim the privilege against self-incrimination, the right to confront witnesses in person, and the right to claim any benefit from a statute of limitations with reference to misdemeanors. The principal rule applicable to criminal cases which may be salvaged is that the evidence must show the alleged contemnor to be guilty beyond a reasonable doubt, a mere preponderance not being sufficient.

The idea that there should not be a deprivation of jury trial in cases of this sort has apparently carried some weight in those instances where the courts have refused to entertain contempt proceedings.[110] If this objection is based on the belief that there should be some fact-finding machinery independent of the court which is to impose the punishment for the alleged contempt, then it should be noted that extensive use is being made in these cases of a referee or a commissioner for such a purpose.[111] While the person so designated by the court to conduct hearings, take testimony, and make findings of fact and conclusions of law is not circumscribed by the rules which accompany a jury trial yet the courts seem to treat his findings as

[105] *Supra* note 57.

[106] *In re* Morse, *supra* note 45. A contrary statement in *In re* McCallum, *supra* note 53, must be based on a mistake as the context would indicate.

[107] Bowles v. U. S., *supra* note 26.

[108] State *ex rel.* Wright v. Barlow, 271 N. W. 282 (Neb. 1937).

[109] See also Bowles v. U. S., *supra* note 26.

[110] State *ex rel.* Indianapolis Bar Ass'n v. Fletcher Trust Co., *supra* note 57; Murphy v. Townley, *supra* note 27.

[111] The most extended use of commissioners or referees to take evidence and report conclusions and recommendations has been in Illinois. People *ex rel.* Illinois State Bar Ass'n v. People's Stock Yards State Bank, *supra* note 47; People *ex rel.* Courtney v. Ass'n of Real Estate Tax Payers, *supra* note 87. People *ex rel.* Chicago Bar Ass'n v. Chicago Motor Club, *supra* note 51. This fact-finding method was availed of in the following cases also, Clark v. Reardon, *supra* note 26; State *ex rel.* Freebourn v. Merchants' Credit Service, *supra* note 37; State *ex rel.* Wright v. Barlow, *supra* note 108. In Colorado the Committee on Grievances of the Colorado Bar Association has acted as a referee. People *ex rel.* Comm. on Grievances of Colo. Bar Ass'n v. Denver Clearing House Banks, *supra* note 41.

they would similar ones by a jury. The testimony is taken in a variety of ways, by stipulation, affidavit, and deposition as well as directly. When the referee files his report, objections to his findings and conclusions are made, and the courts have not hesitated to sustain these objections.[112] The use of this method of fact-determination makes the contempt proceeding much less summary than it is ordinarily thought to be. In effect, it is under these circumstances a trial much as any other (overlooking certain informalities), then an appeal with the ordinary concomitants of appellate procedure and hearing.

(b) The Effect of the Existence of Other Remedies.

The existence of other remedies has been urged in numerous cases, but there has never been a direct holding that it affected the court's power to punish for contempt. In cases where the court has refused to entertain the particular proceeding considerable stress has been laid on the existence of criminal statutes prohibiting unauthorized practice, but in these cases there was either a denial that the activity constituted contempt[113] or a reluctance to use such a drastic implement in the particular case before the court.[114] Thus the existence of another remedy may affect the court's willingness to entertain a contempt proceeding or to recognize that a certain activity constitutes contempt. Usually the other remedy that is referred to is a criminal statute[115] although the Supreme Court of Washington refers to the availability of injunction proceedings.[116] A related question that has not yet arisen is the matter of double jeopardy. If a person has been punished for contempt because of unauthorized practice, could he then be prosecuted criminally on the same facts, or vice versa? The Illinois Court in the *People's Stock Yards Bank* case mentions the possibility of this problem arising, but states that it is not necessary to pass on it because no criminal prosecution against the respondent was involved. Another Illinois case[117] presents a situation that is getting close to the line. The respondent in this case (decided in 1937) had been convicted of unauthorized practice under a criminal statute in 1927, but on appeal this conviction had been reversed.[118] While the respondent had been engaging in the same general line of business over the whole period it was stated that this prior decision did not "work an estoppel" with reference to the 1937 contempt proceeding because identical issues were not involved.[119]

[112] People *ex rel.* Courtney v. Ass'n of Real Estate Tax Payers, *supra* note 87; Clark v. Reardon, *supra* note 26.

[113] Murphy v. Townley, *supra* note 27.

[114] *In re* Bugasch, *supra* note 62; *In re* McCallum, *supra* note 53. In the *Rhode Island Bar Ass'n* case, it was stated that other remedies should be used first if possible. See *infra* p. 155.

[115] People *ex rel.* Illinois State Bar Ass'n v. People's Stock Yards State Bank, *supra* note 47; Clark v. Austin, *supra* note 27; State *ex rel.* Wright v. Barlow, *supra* note 108; Rhode Island Bar Ass'n v. Automobile Service Ass'n, *supra* note 53.

[116] *In re* McCallum, *supra* note 53.

[117] People *ex rel.* Chicago Bar Ass'n v. Goodman, *supra* note 51.

[118] People v. Goodman, 259 Ill. App. 667 (1931).

[119] Another theoretical possibility is jeopardy from multiple contempt proceedings. Would a discharge in a trial court affect contempt proceedings in the supreme court of the state involving the same activity, and vice versa?

Caution in the Use of the Remedy.

It is believed that enough has been said to indicate why contempt proceedings prove attractive to bar association committees searching for a remedy against unauthorized practice. More important than the elimination of procedural delays and technicalities is the fact that in these proceedings the court is made, in effect, a party plaintiff. The reality of the resulting psychological advantage is made apparent by the cases, but an awareness of this same factor has led, in the writer's opinion, to a hesitant attitude on the part of other courts. It is significant that some of the courts which concede that a contempt proceeding may be used against unauthorized practitioners seem nevertheless to treat the remedy rather gingerly. The Rhode Island Supreme Court, after concluding that such a proceeding could be maintained, said:[120]

"Nevertheless, we do not encourage it. In trivial or unimportant instances of illegal practice of the law, it should not be used. Where other remedies are available and efficient to right the wrong complained of, they should first be invoked, unless there is, as in the instant case, an evident need for summary action to protect the public and the jurisdiction of the court. This inherent power of the judiciary to punish for contempt is a necessary but also a dangerous power, and is therefore to be used with great caution."

Reference has already been made to the language of the Supreme Court of New Jersey in an even more conservative vein.[121] Approval of this language was expressed by the Supreme Court of Washington in *In re McCallum,* which also spoke of the dangerous character of the court's power to punish for contempt. Such a drastic remedy cutting off jury trial and other safeguards must be very sparingly used, the court said, its use depending upon the fact situation in each case.

These cautioning remarks have been re-echoed in bar association reports and elsewhere. The recommendations of the committee of the New York State Bar Association are noteworthy because they were formulated after a statute[122] had been passed making unlawful practice of the law contempt of the Supreme Court of that state. The concluding recommendation is:

"That great discrimination be exercised in the selection of cases to be brought. Activities justifying the bringing of a contempt proceeding should be such that the court will want to stop them because their existence interferes (a) with the administration of justice, (b) with the court's control over the general practice of law and (c) with the upholding of the canons of ethics and standards of proper professional practice."

INJUNCTION PROCEEDINGS

Since 1931 bar groups have been obtaining equitable relief against unauthorized practice of the law to a constantly increasing extent. This has been due not only to the enactment of enabling statutes but to the pronouncement of certain courts that in the absence of legislation the injunction is a proper remedy against activity of this sort. The propriety of the remedy has been denied specifically in only one instance

[120] Rhode Island Bar Ass'n v. Automobile Service Ass'n, *supra* note 53 at 129, 179 Atl. 139, at 142.
[121] *Supra* pp. 146-147.
[122] *Supra* note 34.

in the courts,[123] and the effect of this denial has been erased in that jurisdiction by a subsequent statute. Injunctive relief is frequently prayed for and occasionally granted in other types of actions,[124] but, primarily, we are concerned here with proceedings instituted for the purpose of enjoining the alleged unauthorized activities of the defendant and not with incidents of other remedies.

Statutory Development of the Remedy.

Seven states have adopted laws providing specifically that proceedings may be brought to enjoin violations of the *statutes* dealing with unauthorized practice of law,[125] four of these being enacted in 1935. It may be noted that in each instance it is violation of the statutes that is to be enjoined and not just "unauthorized practice of law." This might very well be construed to mean that in a proceeding under the injunction law full recognition would have to be given to such exceptions and provisos as might be contained in the statutes.[126] On the other hand, in a common law proceeding the court may say that it will determine for itself whether or not the activity complained of constitutes practice of law.[127] In most of these statutes it is provided that the attorney general of the state may bring the proceeding,[128] and in Minnesota, North Carolina, and Texas, the local prosecuting attorney is given such authorization. Any bar association is a proper party plaintiff in Massachusetts, and likewise in New York, if the supreme court of the state will so permit, after a showing that the attorney general refused to act when requested. Three individual attorneys can institute proceedings under the statutes in Maine and Massachusetts, and in Rhode Island any licensed attorney may bring the action. Usually the courts of general trial jurisdiction are indicated as the proper place for bringing the action if the statute makes any reference to the forum. However, in Maine and Massachusetts the courts of last resort are given concurrent jurisdiction with the lower tribunals in this respect; thereby making it possible in these states to eliminate the delay attendant upon appeals.

When confronted with proceedings under these statutes the courts have not felt called upon to go into the theory of the remedy,[129] being content to accept the

[123] Wollitzer v. National Title Guaranty Co., 148 Misc. 529, 266 N. Y. Supp. 184 (1934).

[124] Contempt proceedings: see People *ex rel.* Illinois State Bar Ass'n v. People's Stock Yards State Bank, *supra* note 47; People *ex rel.* Courtney v. Ass'n of Real Estate Tax Payers, *supra* note 87; Rhode Island Bar Ass'n v. Automobile Service Ass'n, *supra* note 53. Declaratory judgment: see Richmond Bar Ass'n v. Richmond Ass'n of Credit Men, 167 Va. 327, 189 S. E. 153 (1937). *Quo warranto:* see People *ex rel.* Los Angeles Bar Ass'n v. California Protective Corp., 76 Cal. App. 354, 244 Pac. 1089 (1926); State *ex inf.* Miller v. St. Louis Union Trust Co., 335 Mo. 84, 74 S. W. (2d) 348 (1934).

[125] Maine Laws 1937, c. 142; MASS. ANN. LAWS (Supp. 1937) c. 221, §46B; MINN. STAT. (Mason's Supp. 1936) §5687-1(e); N. Y. CIV. PRAC. ACT, art. 75A, §1221a; N. C. CODE (1935) §199(d); Rhode Island Acts & Resolves 1935, c. 2190, §47; TEX. PEN. CODE (Supp. 1934) art. 430a.

[126] Possibly this is the reason that the plaintiffs in Fitchette v. Taylor, discussed *infra* p. 157, brought their suit on a common law basis instead of under the Minnesota statute.

[127] In *In re* Maclub, 3 N. E. (2d) 272 (Mass. 1936), the petition was brought by the Attorney General under the Massachusetts statute. The court says that in view of this it would not be necessary to determine what remedies might be available to the petitioner apart from the statute. See *infra* p. 158.

[128] Maine, Mass., Minn., N. Y., and Rhode Island.

[129] *In re* Maclub, *supra* note 127; *In re* Shoe Mfgrs. Protective Ass'n, 3 N. E. (2d) 746 (Mass. 1936); *In re* Thibodeau, 3 N. E. (2d) 749 (Mass. 1936); Bennett *ex rel.* N. Y. Co. Lawyers Ass'n v. Supreme

statute without question. It may be noted that all the proceedings under the statutes have been brought by public officials rather than bar associations or individual attorneys, a fact which would indicate that the bar has been able to secure better official cooperation under these laws than seemed to be true in the case of criminal prosecutions. That the existence of a statute does not always solve the problem is shown by the fact that a Minnesota case brought in 1934 by bar association officers disregarded entirely the existence of a 1931 statute in that state, providing for institution of injunction proceedings by either the attorney general or the county attorney. Under the wording of this statute refusal of these officials to act would have effectively blocked the proceeding provided. It is not known, of course, that this was the reason that use was not made of the proceeding authorized by statute.[130]

One of the most interesting developments in connection with this remedy has a statutory basis although the legislation is not specifically directed toward unauthorized practice of law. In Tennessee the legislature has provided[131] that the carrying on, without a license, of any profession, business, or occupation for which a license is required is a public nuisance, subject to abatement by injunction, or under any other procedure by which such nuisances may be abated. It is further provided that the writ of injunction may be sued out by the official body charged with the supervision of the particular business or profession or by any person affected by the nuisance. Under this statute, injunctions have been obtained upon three occasions against alleged unauthorized practitioners.[132] The court did not elaborate upon the remedy, simply noting in each instance that the defendant's activity fell within the wording of the statute. Statutes similar to this are in existence in other states, and they have been used as the basis of injunctions against the illegal practice of other professions.[133] The possibility of using this "nuisance theory" in the absence of statutory authorization will be considered subsequently. It might be observed that the Tennessee Court did not attach any importance to the status of the parties who brought these cases, nor did the style of the proceeding seem to make any difference. Two of the cases were brought in the name of the state by certain members of the bar, without any allegation that the suit was being brought on behalf of a class, or any reference to authorization.[134] In the last case, however, the form used was that of a class action; the form usually followed in injunction proceedings in the absence of statute.

Enforcement Corp., 250 App. Div. 265, 293 N. Y. Supp. 870 (1937), *aff'd.* 11 N. E. (2d) 315 (1937); State *ex rel.* Seawell v. Carolina Motor Club, 209 N. C. 624, 184 S. E. 540 (1936).

[130] See reference to another possibility *supra* note 126.

[131] TENN. CODE (1932) §§9316, 9317.

[132] State *ex rel.* Chattanooga Bar v. Retail Credit Men's Ass'n, 163 Tenn. 450, 43 S. W. (2d) 1918 (1931); State *ex rel.* v. James Sanford Agency, 167 Tenn. 339, 69 S. W. (2d) 895 (1934) (these two cases combined a proceeding in the nature of *quo warranto* with the prayer for injunctive relief); Lamb v. Whitaker, 105 S. W. (2d) 105 (1937).

[133] See State v. Fray, 214 Iowa 53, 241 N. W. 663 (1934). See note 162, *infra.*

[134] See *infra* pp. 164-165.

Theory of the Remedy in Absence of Statute.

(a) Protection of a "Franchise."

The development of the use of the injunction proceeding against unauthorized practice of law must be credited largely to the Ohio courts and, more accurately perhaps, to the activities of two attorneys in that state.[135] The supreme court of the state did not even pass on the matter until 1934,[136] but since 1931 a decision of an Ohio intermediate appellate court has been recognized as a leading case. In *Dworken v. Apartment House Owners' Ass'n*,[137] the Court of Appeals for Cuyahoga County announced that lawyers, in their license to practice law, have an interest in the nature of a franchise which may be protected by injunction. Apparently, the court was troubled here, as other courts have been since, by the oft-repeated dogma that the practice of law is not a property right but may be more properly termed a "privilege burdened with conditions"[138] on the one hand, and the idea that an injunction does not issue except to ward off threatened injury to property on the other. The court picked its way cautiously between the horns of the dilemma by describing the "right" to practice law as a "valuable privilege," exclusive in a class of individuals who have demonstrated a special fitness. What the licensed attorneys possess then, according to the court, is a "right in the nature of a franchise." The final step in the reasoning is the proposition that franchises are property and are frequently invested with the attributes of property generally. The only support for this proposition, the court admits, are cases dealing with the granting of exclusive franchises to corporations. Hence in its conclusion the court recedes to the position that what is being protected is an "interest in the nature of a property right."

While the court's holding must be placed on the reasoning indicated, yet it is significant that a great deal of time was spent by the court in toying with the propositions that equitable relief is not restricted to the protection of property rights, and that in the granting of relief the court is not hampered by mere absence of precedent. This, it might be added, seems to be the usual technique in the cases which are based on the "property right" notion.[139]

In developing the injury-to-property-rights theme the plaintiff alleged that he was practicing by virtue of a franchise granted him by the supreme court of the state and the federal courts; that he had been practicing for 17 years and had built up a large and valuable practice; and that the practices of the defendant were contrary to the rights of the plaintiff and all other attorneys and that they tended to bring the legal profession into disrepute. It is further stated that the plaintiff had no adequate

[135] Sol Goodman of the Cincinnati Bar Association and Jack B. Dworken of the Cuyahoga County Bar Association, Cleveland, seem to have undertaken their injunction campaign at about the same time. Their activity is illustrated by the large number of cases in the lower Ohio courts entitled, "Goodman v. ———" and "Dworken v. ———." As party plaintiffs their only close competition is from Milton Yeats of the Tampa, Florida, Bar Association. See cases collected in BRAND, *op. cit supra*, note 2, at 808 and 810.

[136] Land Title Abstract & Trust Co. v. Dworken, 129 Ohio St. 23, 193 N. E. 650 (1934).

[137] 38 Ohio App. 265, 176 N. E. 577 (1931).

[138] Cardozo, J., in People *ex rel.* Karlin v. Culkin, 248 N. Y. 465, at 470, 162 N. E. 487, at 489 (1928).

[139] See, particularly, Fitchette v. Taylor, 191 Minn. 582, 254 N. W. 910 (1934).

remedy at law and that he (and other attorneys) would be irreparably damaged if the injunction did not issue. There was no allegation of special injury or damage.

The Supreme Court of Ohio, when it later had occasion to pass on this same question in 1934, stated that it was "quite generally held" that a licensed attorney has a "special privilege in the nature of a franchise" and that the adequate remedy for an invasion of the "right thus vested in him" was by injunction.[140] Reference was made to a 1933 New Jersey case in support,[141] but there was no mention of the earlier Ohio Court of Appeals case. In the most recent decision of the Ohio Supreme Court in this field, the propriety of the injunction proceeding was not even called into question.[142]

The most straightforward assertion of the "property right" theory appeared in the 1933 New Jersey case referred to.[143] The court says that attorneys at law in that state received their right to practice law by letters patent issued by the governor and so are holders of a franchise. On the authority of a dictum in a case involving criminal prosecution of illegal practice of dentistry, the court points out that the practice of any ordinary calling, business, or profession is property, and hence, *a fortiori,* the right to practice the profession of law, boasting so noble a pedigree,[144] is a property right.

Minnesota and Washington courts have announced adherence to the "franchise theory."[145] Other courts have indicated the possibility of using the injunction proceeding without making clear the basis upon which they would proceed.[146] Some courts would, undoubtedly, prefer the doctrine discussed in this section since it represents formal adherence to the more orthodox equitable principles.

The decision of a lower New York court in *Wollitzer v. National Title Guaranty Co.*[147] is the only one which specifically denies the propriety of the use of an injunction proceeding against an unauthorized practitioner. There are bases upon which the case could be distinguished, *viz.,* the action was not a class suit but was brought by an individual attorney,[148] and the defendant's acts were said not to constitute unauthorized practice of law. However, the court considered and disapproved the Ohio decision in the *Apartment House Owners* case.[149] The principal ground of the

[140] Land Title Abstract & Trust Co. v. Dworken, *supra* note 136.

[141] Unger v. Landlords' Management Corp., 114 N. J. Eq. 68, 168 Atl. 229 (1933).

[142] Judd v. City Trust & Savings Bank, 133 Ohio St. 81 (1937).

[143] Unger v. Landlords' Management Corp., *supra* note 141.

[144] The historical roots of the New Jersey practice, the court said, go back to the "king's prerogative" which was also the source (and part of the substance of) franchises.

[145] Fitchette v. Taylor, *supra* note 139; Paul v. Stanley, 168 Wash. 371, 12 P. (2d) 401 (1932).

[146] See Rinderknecht v. Toledo Ass'n of Credit Men, 13 Fed. Supp. 555 (N. D. Ohio, 1936); Sharp-Boylston Co. v. Haldane, 182 Ga. 833, 187 S. E. 68 (1936); Murphey v. Townley, *supra* note 27. Compare Cain v. Merchants National Bank, 66 N. D. 746, 268 N. W. 719 (1936). See State Bar of California v. Security First National Bank (1934) 9 L. A. Bar Bull. 181 (Super. Ct., Calif., 1934). The extent to which the injunction proceeding is being used in this field is not fairly indicated by the decisions of the appellate courts. See collection of references in BRAND, *op. cit. supra* note 2, at 808-814.

[147] 148 Misc. 529, 266 N. Y. Supp. 184 (1934), *aff'd.* 241 App. Div. 757, 270 N. Y. Supp. 968 (1934).

[148] See Steinberg v. McKay, 3 N. E. (2d) 23 (Mass. 1936).

[149] *Supra* note 137.

court's holding seems to be the absence of a showing of special damage, it being stated that the plaintiff's allegation that his practice had "greatly suffered" was insufficient for this purpose. Since this decision a New York statute has been passed permitting injunctions against unauthorized practice of law.[150]

(b) Protection of the Administration of Justice.

Some of the courts which have used the "property right" theory have indicated that it was not altogether satisfactory, and in no recent decision has any stress been placed upon it. The reason for this abandonment is not hard to find. One of the greatest difficulties of the bar associations' campaign against unauthorized practice has been to dispel the idea that what was being done was for the material benefit of the lawyers and to replace it with the idea that it was primarily the public welfare with which the bar was concerned. It is not surprising, therefore, that the reasoning of the *Apartment House Owners* case should be frowned upon as tending to defeat this objective. There has been developed as an alternative to the theory of the latter case, a hypothesis, with no very clearly defined basis in precedent, that injunction proceedings are appropriate and necessary to protect not only attorneys but the courts and the public as well against unauthorized activity, since this activity tends to bring the entire administration of justice into disrepute. It is obvious that this approach is closely analogous to that which was announced in connection with proceedings against constructive contempts.[151]

Apparently the earliest case which might be considered as adopting this approach is the 1934 decision of the Supreme Court of Pennsylvania in *Childs v. Smeltzer*.[152] The court did not go at any length into the propriety of the injunction proceedings but there is no reference whatsoever to "property rights," and the court said:[153]

> "The strict regulation and control of persons who render legal services is as necessary and essential to the welfare of the public at large as the requirements for the practice of medicine or dentistry. A duly admitted attorney is an officer of the court and answerable to it for dereliction of duty. Except in proceedings of the character of the one now before us, the courts are powerless to supervise the unlicensed practitioner."

Decisions of the Minnesota and Oklahoma courts during the same year use language indicating a similar viewpoint although the actual holdings are on a more restricted basis.[154] The Minnesota court pointed to its powers over attorneys, which included preventing them from engaging in the unlawful practice of law. "It would be anomalous," the court says, "if we had no similar power to protect the public from the illegal practice of law by laymen. . . . While the traditional office of an injunction is the protection of property . . . there is a noticeable absence of judicial attempt . . .

[150] *Supra* note 125.

[151] *Supra* p. 144.

[152] Childs v. Smeltzer, 315 Pa. 9, 171 Atl. 883 (1934).

[153] *Ibid.* at 15, 171 Atl. at 886.

[154] Fitchette v. Taylor, *supra* note 139; State Bar of Oklahoma v. Retail Credit Ass'n, 170 Okla. 246, 37 P. (2d) 954 (1934). In Boyd v. Second Judicial District Court, 51 Nev. 264, 274 Pac. 7 (1929) it was stated that courts have inherent power to prevent injustice, and hence may enter an order enjoining the appearance of an attorney in a case in which he could not ethically participate.

to hamper the power of equity to grant injunctional relief where obviously it is needed in the interests of justice." The court finds, however, that it does not have to venture into new fields but can grant the injunction on the basis of protecting a property right.[155]

The first instance where this idea of protecting the administration of justice was set forth clearly as the basis of the decision was by the Supreme Court of Kansas in *Depew v. Wichita Retail Credit Ass'n*.[156] The plaintiffs in this case had made allegations very similar to those set forth in the *Apartment House Owners* case as to the value of their practice. However, if the court was to grant relief on the basis suggested by such allegations, it was faced with the task of distinguishing some of its previous decisions in which it had emphasized the fact that the practice of law was not a property right.[157] The court did not choose to overrule these cases, and stated that a license to practice law is not property, although it is in the nature of a franchise. Instead, the propriety of the remedy was explained as follows:[158]

"So whether or not the interest of the plaintiffs in their professional capacities is in the nature of a property right, they have . . . a special privilege, franchise, and duty as officers of the court to protect the legal profession, the courts, and the administration of justice generally and it would seem to be well within such special franchise and privilege to protect, not only themselves, and others of their profession, but the courts of which they are officers, against the illegal and unprofessional conduct of others. . . .

"Licensed privileges of attorneys and duties as court officers are so closely related and interwoven as to justify their maintaining an action to sustain the honor of the court and restrain the unlawful practice of law."

It was in this same case that Judge Burch delivered the concurring opinion set forth previously,[159] which has some applicability to the point under discussion, in that, under his approach, there would be no need to consider the proceeding as adversary in character, and, therefore no need to show an interest of some sort on the part of the moving parties. In a later case the Kansas court has granted an injunction without discussing the propriety of the remedy.[160]

The influence of the principal case may be noted in certain of the lower court decisions instituted since it was announced.[161] Because this doctrine does away with the necessity of fitting the proceedings into the conditions precedent to the granting of an injunction to protect property, because of its convenient generality, and because it is more in keeping with the development of the "inherent powers" of the court over the practice of law, it is likely to displace the "franchise theory" to a large extent and lead to a more extended use of the injunction in unauthorized practice cases.[162]

[155] *Supra* note 139 at 585, 254 N. W. 910 at 911. [156] 141 Kans. 481, 42 P. (2d) 214 (1935).

[157] *In re* Casebier, 129 Kans. 853, 284 Pac. 611 (1930).

[158] 141 Kans. 481 at 485, 42 P. (2d) 214 at 217. [159] *Supra* p. 149.

[160] Depew v. Wichita Ass'n of Credit Men, 142 Kans. 403, 49 P. (2d) 1041 (1935).

[161] See cases in BRAND, *op. cit. supra* note 1, at 808-814.

[162] An interesting subject for speculation is the possibility of securing injunctive relief against unauthorized practice of law on the ground that such activity is subject to abatement as a public nuisance. As a matter of fact the "protection of the administration of justice" theory might be considered a refinement of such an approach. Such a theory has not been announced by any court except in Tennessee where

Existence of Legal Remedies.

In granting an injunction against certain forms of unauthorized practice of law the courts have usually been called upon to sidestep the principle that an injunction should not issue where there is an adequate remedy at law.[163] In no instance have the courts allowed this principle to prevent the granting of the relief prayed for. In those proceedings where there has been a refusal to grant the relief, this has never been announced as the basis for the refusal.

The legal remedies which have been urged as preventing the issuance of an injunction against unauthorized practice are criminal prosecution and *quo warranto* proceedings. The existence of this last remedy has been raised in both Kansas[164] and Ohio[165] without success but in neither instance was the contention discussed satisfactorily by the court. The Kansas situation was rather unusual because there was no criminal statute in that state forbidding unauthorized practice of law; *quo warranto* being the established method of dealing with such practice.[166] In passing on the question the court refers to, but does not declare to be controlling, its language in a previous *quo warranto* proceeding against unauthorized practice of law in which it had been stated that the form in which the matter was brought to the court's attention was not important.[167] Then, after setting forth several quotations to the effect that injunctive relief was being rapidly expanded, the court passes to the consideration of other matters. The Ohio court disposes of the contention by referring to some rather obscure language appearing earlier in its own opinion, apparently sanctioning indirect attacks by use of the injunction on corporate charters.[168]

The existence of a criminal statute may take on a two-fold aspect. It may go to the question of the adequacy of the legal remedy, but more often it is discussed in connection with the principle that equity will not enjoin the commission of a crime. Sometimes the point is disposed of with the assertion—for which precedent is ample —that this principle will not prevent the issuance of an injunction if there is ground for it otherwise.[169] An Ohio court, however, has actually come to grips with the

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there was a specific statutory declaration. *Supra* note 132. The strongest argument for the use of the theory, even in the absence of a statute similar to that in Tennessee, is the fact that it has been availed of by other professions. Kentucky State Board of Dental Examiners v. Payne, 213 Ky. 382, 281 S. W. 188 (1926); Seifert v. Buhl Optical Co., 276 Mich. 692, 268 N. W. 784 (1936); Sloan v. Mitchell, 113 W. Va. 506, 168 S. E. 800 (1933); see (1937) 35 MICH. L. REV. 497.

[163] A similar principle that there should be a threat of continued unlawful acts raised the question of the effect of a promise by a corporate officer that certain acts of unauthorized practice would not be engaged in. In Depew v. Wichita Ass'n of Credit Men, *supra* note 160 at 413, 49 P. (2d) at 1047, the Kansas court said: "This general principle of law may be correct, but the feature of reliance on a promise, if it were a personal case, is different from reliance upon the promise of a corporation and its officers and managers all of whom may be replaced and their successors feel differently about obeying such promise. Courts are not required to accept and rely upon promises under all circumstances, and, unless they do so rely, the danger of repetition of a wrong may be prevented by injunction."

[164] Depew v. Wichita Retail Credit Ass'n, *supra* note 156.

[165] Dworken v. Apartment House Owners' Ass'n, *supra* note 137.

[166] See *infra* p. 166.

[167] *Supra* note 74.

[168] 38 Ohio App. 265, 274, 176 N. E. 577, 580.

[169] Fitchette v. Taylor, *supra* note 139; Unger v. Landlords' Management Corp., *supra* note 141; Paul v. Stanley, *supra* note 145.

problem, and solved it, by denominating criminal prosecution as an inadequate remedy " . . . recourse to the criminal statutes would afford an inadequate, cumbersome and complex method of accomplishing that which the plaintiff seeks to bring about . . . namely, a cessation of illegal practice of law."[170] The court further pointed out that the defendant's acts would have been illegal even in the absence of the criminal statute.

This last statement is suggestive of the approach taken by the Oklahoma Supreme Court in dealing with the "criminal remedy" point.[171] The State Bar, created by statute, was seeking in this case to have a corporation restrained from unauthorized practice of the law. The court said:[172]

"The State Bar Act does provide that any unauthorized person who engages in the practice of law shall be guilty of a misdemeanor. That statute is not purely or primarily a criminal statute. The act was passed to further regulate the practice of law, to provide for [creation of integrated bar]. . . . As an incident thereto it made persons guilty of a misdemeanor who practiced law in violation of the act. That provision was evidently adopted as an addition or positive deterrent to the unauthorized practice of law by those not entitled to practice. It is difficult to find in this provision any possible restriction or limitation upon the duties or power of the state bar. The primary purpose of the act was not to create a crime but to provide for the public welfare."[173]

Whether this reasoning is available in those states where no statutory bar exists is matter for conjecture. The test laid down seems to be whether or not the criminal provision is "incidental" to the principal purpose of the statute. It is not likely that even this test would be invoked if by doing so it would operate to defeat the remedy, for it seems obvious that the courts are not going to allow the existence of a criminal statute to prevent the issuing of an injunction where they are otherwise inclined to grant it.

Parties Plaintiff.

It has been observed that injunction proceedings under statutes have in every instance been prosecuted by public officials,[174] even though it was permissible for other parties to act. In the absence of statute it would seem that the attorney general or local prosecuting attorney could bring such proceedings.[175] Georgia is the only state, however, where a public official (the prosecuting attorney) has brought injunc-

[170] 38 Ohio App. 265, 274, 176 N. E. 577, 580. In this case the allegedly illegal acts of the defendant numbered into the thousands.

[171] State Bar of Oklahoma v. Retail Credit Ass'n, *supra* note 154.

[172] *Ibid.* at 250, 37 P. (2d) at 958.

[173] The court finds authority for this approach in Kentucky State Board of Dental Examiners v. Payne, *supra* note 162.

[174] *Supra* p. 157.

[175] See State Bar of California v. Security First National Bank, *supra* note 146. If the "abatement of a nuisance" theory were made use of against unauthorized practitioners (see note 162 *supra*), then possibly a public official would be required to institute the proceedings because of the doctrine that public nuisance may not be abated by a private individual without a showing of special injury. *Cf.* Wollitzer v. National Title Guaranty Co., *supra* note 123.

tion proceedings in the absence of statute, no question being raised as to the propriety of his act.[176]

The power of an integrated state bar to bring such proceedings is a question which will probably be of increasing importance. Only the Oklahoma Supreme Court has passed on the point directly in *State Bar of Oklahoma v. Retail Credit Ass'n*.[177] The State Bar in this instance had been given by statute the power to sue and be sued and to "aid in the advance of the science of jurisprudence and in the improvement of the administration of justice." It was further provided in the statute that only active members of the bar therein created could practice law in the state. The court interprets the act to mean that the State Bar is empowered to enforce the provisions of the statute creating it by the use of whatever lawful means it might wish to employ for that purpose, including the injunction. In 1934 a lower court in California held that the integrated bar in that state could not prosecute an injunction proceeding against unauthorized practice.[178] It does not appear that an appeal was taken, and no attempt seems to have been made to institute such proceedings since that time. This court's approach is rather difficult to follow, for after holding that the State Bar could not prosecute the action, it stated that an individual attorney might do so, and probably an unincorporated bar association also.[179] The reasoning of the court was that the State Bar was a corporation with limited powers over the practice of law, and the power to institute proceedings of this sort was not delegated to it. Furthermore, the proceeding was not a class action since the state bar could not practice law and had no interest in the profits of its members. The Washington State Bar Association (likewise an integrated bar) has prosecuted a proceeding for an injunction which was denied on grounds not related to the point under discussion.[180] It would be of doubtful wisdom to attempt any generalization on the basis of these cases, except that it may be concluded that the answer probably depends upon the statute under which the bar was created.

The predominant form in which injunction proceedings are prosecuted is that of the representative or class suit, the class comprising the representatives and a larger group of attorneys usually described as those "similarly situated." It is frequently added that the suit is also being brought on behalf of certain bar associations, the courts, and the public.[181] The group of attorneys included in the class has varied from those in the same city[182] to those throughout the state.[183] Most courts have

[176] Atlanta Title & Trust Co. v. Boykin, 172 Ga. 437, 157 S. E. 455 (1931); Boykin v. Hopkins, 174 Ga. 511, 162 S. E. 796 (1932).

[177] *Supra* note 154.

[178] State Bar of California v. Security First National Bank, *supra* note 146.

[179] There is no reported instance of an unincorporated bar association instituting injunction proceedings of this nature.

[180] Washington State Bar Ass'n v. Merchants' Rating & Adjusting Bureau, 183 Wash. 611, 49 P. (2d) 26 (1935).

[181] See Fitchette v. Taylor, *supra* note 139; Dworken v. Apartment House Owners' Ass'n, *supra* note 137; Child v. Smeltzer, *supra* note 152; Shortz v. Farrell, 327 Pa. 81, 193 Atl. 20 (1937); Paul v. Stanley, *supra* note 145.

[182] Depew v. Wichita Retail Credit Ass'n, *supra* note 158.

[183] Unger v. Landlords' Management Corp., *supra* note 141.

failed to make explicit the necessity (if it exists) for following this form in bringing the suit for an injunction. However, in every instance, in the absence of statute or action by a public official, where the relief was granted the class suit was used. Furthermore in two instances of denial of relief it is possible that failure to adopt the class action form had some bearing on the result. The extent to which this is true in the *Wollitzer* case[184] can not be stated exactly, but it is a condition accompanying the adverse decision. The Supreme Judicial Court of Massachusetts apparently relied upon this basis to dismiss the complaint in *Steinberg v. McKay,*[185] stating that it appeared that in all successful suits of this nature the bill had been brought on behalf of an entire class of licensed practitioners. The same court has not been hesitant about granting injunctions against unauthorized practice.[186]

Undoubtedly, the plaintiffs will continue to adhere to the representative suit in form in these injunction proceedings, even if its exact effect remains a matter of mystery. There are good reasons for its use. If the "property right" theory is being advanced as the basis for the injunction, it would be easier to attach pecuniary value to the practice of a whole class of attorneys than to any one, and the adverse effect of unauthorized practice upon the aggregate of legal business in a city or county is not quite so elusive a matter as is its effect upon any individual attorney. A proceeding under the "protection of the administration of justice" theory is bolstered by the class suit—the idea of all attorneys joining hands in keeping the processes of justice undefiled being an attractive one, and quite in keeping with their positions as officers of the court which gives them the interest sufficient to bring the action. Finally, if the idea were developed that unauthorized practice of law could be abated as a public nuisance[187] the class suit might escape the prohibition against private abatement of such nuisances. A suit on behalf of a class of attorneys, the courts and the public has a ring of the "official" about it that might aid in dispelling the idea that the suit was a private one for the benefit of the actual plaintiff or plaintiffs. It is possible, also, if a showing of special injury is to be required, to advance the argument that attorneys, as a class, suffer damage from instances of unauthorized practice that is quite distinct from that suffered by the public at large.

EXTRAORDINARY REMEDIES AND THE DECLARATORY JUDGMENT

Quo Warranto

Since *quo warranto* or, more properly, a proceeding based on an "information in the nature of *quo warranto*" has traditionally been used to inquire into the right to exercise the privileges of a certain office or franchise, it was a natural development that this remedy should be used against those who practiced law without a license. It has been invoked against both individuals and corporations.

[184] *Supra* note 123.

[185] *Supra* note 148.

[186] See *In re* Maclub, *supra* note 127, and *In re* Shoe Mfgrs. Protective Ass'n, *supra* note 129. These cases were instituted by the Attorney General under statute but the court in *In re* Maclub indicates that the remedy would be available apart from statute.

[187] *Supra* note 162.

Statutory *quo warranto* proceedings against individuals were carried to the supreme courts of Alabama[188] and Kansas,[189] resulting in each instance in cease and desist orders. The Kansas statute, which seems declaratory of the common law, authorizes the proceeding when any person shall usurp, intrude into or unlawfully hold or exercise any public office or shall claim any franchise within the state to which he is not entitled. The Kansas court justified the use of the writ by referring to the facts that the licensed attorney is an officer of the court and that his license has been quite commonly denominated a franchise.

Early use of the proceeding in this field was against corporations organized for the purpose of furnishing legal services.[190] In each case the corporation's charter was revoked since it neither had nor could acquire a license to practice law and the carrying out of its declared objects would necessarily involve such practice. The courts did not rely on statutory definitions of "practice of law," using instead the common understanding of the term. Two of the cases arose in California where by statute it was declared to be lawful to form a corporation for any purpose for which individuals could lawfully associate themselves. The court purported to answer this by asserting that even attorneys may not form a corporation for the practice of law.[191]

These cases differ somewhat from later cases in that in the former it was sought to prevent unlawful use of powers expressed in the corporate charter. The charge in more recent cases is that the corporation, even though it does not pretend to practice law or offer legal services, is unlawfully exercising a power which it does not possess.[192] This approach, of course, will make the decision turn on the definition of "practice of law" adopted by the court. In the cases involving corporations organized specifically to render legal services the courts did not hesitate to revoke the charter, but such a harsh remedy has not been used when the proceedings have been directed against corporate collection agencies and trust companies. In such cases the courts assert a discretionary power to direct an ouster as to the activities deemed to constitute the practice of law without revoking the charter.[193] With this ouster order is usually coupled a warning that revocation will follow violations of the order.

The attorney general is usually regarded as the proper official to institute such proceedings,[194] but local prosecutors have also acted in this capacity.[195] In some

[188] Berk v. State, 225 Ala. 324, 142 So. 832 (1932).

[189] State *ex rel.* Boynton v. Perkins, 138 Kans. 899, 28 P. (2d) 765 (1934).

[190] People *ex rel.* Lawyers Institute of San Diego v. Merchants' Protective Corporation, 189 Calif. 531, 209 Pac. 363 (1922); People *ex rel.* Los Angeles Bar Ass'n v. California Protective Corp., 76 Cal. App. 354, 244 Pac. 1089 (1926); State *ex rel.* Lundin v. Merchants' Protective Corp., 105 Wash. 12, 177 Pac. 694 (1919).

[191] People *ex rel.* Los Angeles Bar Ass'n v. California Protective Corp., *supra* note 190.

[192] State *ex rel.* Beck v. Wichita Ass'n of Credit Men, 142 Kans. 403, 49 P. (2d) 1041 (1935). State *ex inf.* Miller v. St. Louis Union Trust Co., 335 Mo. 845, 74 S. W. (2d) 348 (1934); State *ex rel.* McKittrick v. C. S. Dudley & Co. 102 S. W. (2d) 895 (Mo. 1937).

[193] State *ex rel.* Beck v. Wichita Ass'n of Credit Men; State *ex inf.* Miller v. St. Louis Union Trust Co.; State *ex rel.* McKittrick v. C. S. Dudley & Co., all *supra* note 192; State *ex rel.* Retail Credit Men's Ass'n, 163 Tenn. 450, 43 S. W. (2d) 918 (1931).

[194] People *ex rel.* Lawyers' Institute v. Merchants' Protective Corp., *supra* note 190; People *ex rel.* Los Angeles Bar Ass'n v. California Protective Corp., *supra* note 190; State *ex rel.* Boynton v. Perkins, *supra* note 189; State *ex rel.* Beck v. Wichita Ass'n of Credit Men, *supra* note 192; State *ex rel.* McAllister

instances a group of attorneys alone have acted as moving parties.[196] In a California case brought by the attorney general at the instigation of a local bar association, the naming of the association as relator was challenged. The court said:[197]

"In support of its contention that respondent had no legal capacity to sue, appellant says that 'the relator,' the Los Angeles Bar Association, 'is not a corporation and therefore has no standing in court to sue in the name of the association.' This contention betrays an inexplicable misunderstanding of the nature of this proceeding and of the relation thereto of the 'people' as plaintiff. The wrong of which complaint is made is of public, not private, concern. The only connection of the bar association with the case is shown by the opening of the complaint, wherein it is recited that the 'people,' by their attorney general, 'upon the information and complaint of the Los Angeles Bar Association,' complain of defendant and allege the cause of action. The addition of the name of the bar association to the complaint did not make this a private action. It, doubtless, is true that the arm of the law moved as the result of information given to the attorney general by the bar association; but that did not make the bar association the plaintiff in this action."

In many respects this remedy would seem to be the simplest and most direct of those so far considered. It does not require the use of the rather tenuous theories upon which contempt proceedings must sometimes be based. It does not require a showing of a special interest in the moving party that characterizes the use of the injunction. Frequently it may be brought as an original proceeding in the supreme court of the state thus obviating the delay attendant upon appeals. The hazards of jury trial are eliminated. In view of these facts it is somewhat surprising that greater use has not been made of the remedy.

Mandamus and Prohibition

Even among extraordinary remedies mandamus and prohibition occupy a position of "high prerogative." These writs are, in a sense, correlative, the one commanding and the other forbidding certain official action. Higher courts may thus command inferior courts or other tribunals, and, with the writ of mandamus at least, public officials. The use of these remedies in the unauthorized practice field would require a different approach from that of the other procedures considered. The latter have involved direct proceedings against the alleged unauthorized practitioner, while these remedies would necessarily be indirect in their effect unless the tribunal or official to which the writ was directed was engaged in unauthorized practice.[198]

Reference has already been made to the failure of the State Bar of California to secure a writ of mandamus from the Supreme Court of that state directed to a lower

v. Sanderson, 280 Mo. 258, 217 S. W. 60 (1919); State *ex rel.* McKittrick v. C. S. Dudley & Co., *supra* note 192.

[195] State *ex inf.* Miller v. St. Louis Union Trust Co., *supra* note 192; State *ex rel.* Lundin v. Merchants' Protective Corp., *supra* note 190.

[196] Berk v. State, *supra* note 188; State *ex rel.* v. Retail Credit Men's Ass'n, *supra* note 193. In the two California cases, *supra* note 190, bar associations appear as the moving parties and this was true in fact, but nonetheless the attorney general of the state brought the action.

[197] *Supra* note 190 at 358, 244 Pac. at 1091.

[198] *E.g.*, a justice of the peace, or a probate judge. See Moulton v. Byrd, 224 Ala. 403, 140 So. 384 (1932).

court which had dismissed contempt proceedings brought against alleged unauthorized practitioners.[199] In that instance the lower court had not refused to act judicially, but had simply dismissed the proceedings on the ground that the facts alleged did not set forth a contempt. It is frequently stated that recourse is not to be had to mandamus to control the form that judicial action shall take, its purpose being rather to compel the discharge of the judicial function in appropriate instances.[200]

Prohibition was used successfully as the remedy in *Goodman v. Beal*,[201] decided by the Supreme Court of Ohio in 1936. In this case the members of the Unauthorized Practice of Law Committee of the Ohio State Bar Association brought original proceedings in the Supreme Court for the writ of prohibition to be directed against the members of the State Industrial Commission, to "restrain" them from permitting laymen to appear before the commission in a representative capacity. The writ was allowed in part, but the question of the remedy was not treated because the defendants did not challenge its propriety. The Court does state, however, that it has recognized previously the applicability of the writ of prohibition to the Industrial Commission, and no doubt the case will be treated as substantial authorization for its use. Prohibition is regularly used to prevent tribunals from exceeding their jurisdiction. Presumably in applying this principle to the case of the Industrial Commission it would be argued that the commission had exceeded its jurisdictional powers in permitting the practice of law before it by laymen because the admission to practice is a matter over which the Supreme Court alone has control.

The effectiveness of the writ may be observed from the fact that it affected all "lay" practitioners before the Ohio Commission, even though they were not made parties to the suit.[202] This procedure, when used against administrative tribunals and state officials who license or issue permits to groups accused of unauthorized practice, would seem to be as sweeping an attack as possible, since it interdicts certain activity on the part of a whole class of individuals within the state, an objective not ordinarily achieved by any other means.

Declaratory Judgments

Where available the declaratory judgment makes possible an adjudication of right even though no consequential relief is, or could be, sought. As a method of proceeding against unauthorized practice of law it has been used on only one occasion. In this instance the Richmond Bar Association brought a suit in equity against the Richmond Association of Credit Men asking for a declaratory judgment under the Virginia statute,[203] that the Association was engaged in the unauthorized practice of law. Such a decree was entered and sustained on appeal with immaterial changes.[204] The propriety of the remedy was not attacked; in fact, the defendant association

[199] State Bar of California v. Superior Court, 40 Cal. (2d) 86, 47 P. (2d) 697 (1936). See p. 149, *supra*.

[200] *Ex parte* Alabama State Bar Ass'n, 92 Ala. 113, 8 So. 768 (1891).

[201] 130 Ohio State, 200 N. E. 470 (1936).

[202] This may be compared with the contempt proceedings against individual practitioners before a similar body in Missouri. Clark v. Austin, *supra* note 27.

[203] VA. CODE (1936) c. 254A, §§6140a *et seq.*

[204] Richmond Bar Ass'n v. Richmond Ass'n of Credit Men, 167 Va. 327, 189 S. E. 153 (1937).

expressed its desire to have a declaration from the court stating what the law was on the subject.

There would seem to be little doubt of the applicability of this remedy to the unauthorized practice situation.[205] It should be borne in mind, however, that the declaratory judgment does not do away with the usual procedural and substantive requirements, except as to the invoking of consequential relief.[206] In the Virginia case the court coupled an injunction order with the declaratory judgment but the lack of such a sanction would not deprive the proceeding of its tactical value in the unauthorized practice campaign.

METHODS OF FACILITATING THE INSTITUTION OF ACTIONS

Court Committees

Some of the most remarkable procedural developments in the unauthorized practice of law field relate to the preliminary investigation of complaints rather than to the application of remedies. Bar groups in certain of the states have requested their courts to appoint committees to investigate instances of unauthorized practice within their jurisdiction. In complying with these requests lower courts in Florida, Minnesota and Ohio have usually designated the petitioning committee as its committee for the purpose, and to facilitate their work have given them power to subpoena witnesses and documents and take testimony under oath.[207] In the earlier instances, the courts did designate one judge to conduct the hearings in connection with the investigation[208] but more recently this practice has not been followed, the full exercise of the powers being given to the committee itself, acting as an "arm of the court." Missouri is the one state in which such a committee has been set up on a state-wide basis, and the explanation for this is to be found in the attitude of the supreme court of that state concerning its inherent powers over the practice of law.[209] Most of the committees, have been appointed by courts of general trial jurisdiction and the authority under which they can do this is not very clearly defined. Essentially, it is the same problem as arose in connection with the power of these lower courts to punish for constructive contempt.[210] To sustain their power to establish committees to conduct a general investigation into the practice of law in that locality it must be established that, inherently, they have power to control law practice and the administration of justice within their territorial jurisdiction. It has been asserted by an Ohio appellate court that such is the case,[211] but in the only instance in which

[205] It is interesting to note that in two cases laymen have brought actions against the bar groups for declaratory judgments. See (1937) 3 UNAUTH. PRAC. NEWS 67, and (1938) 4 *id.* 16.

[206] BORCHARD, DECLARATORY JUDGMENTS (1934) 24.

[207] *In re* Petition of Committee on Rule 28 (Ohio C. P. 1931); *In re* Inquiry into Unauthorized Practice of Law in Franklin County (Ohio C. P. 1935); *In re* Inquiry into Unauthorized Practice of Law in Columbiana County (Ohio C. P. 1935); *In re* Inquiry into Unauthorized Practice of Law in Dade County (Fla. Cir. Ct. 1935); *In re* Petition for Investigation of Unauthorized Practice of Law in Hennepin County (Minn. Dist. Ct. 1936), all references are collected in BRAND, *op. cit. supra* note 1, at 815.

[208] *In re* Petition of Committee on Rule 28, *supra* note 207; see Morton v. Beery, 39 Ohio L. Rep. 273 (Ohio App. 1933).

[209] *Supra* p. 145. See Clark, *Missouri's Accomplishments and Program for Eliminating the Unauthorized Practice of Law* (1936) 22 A. B. A. J. 9.

[210] *Supra* p. 148-150.

[211] Morton v. Beery, *supra* note 208.

a court of last resort has passed on the matter, the power was denied.[212] The status of these committees must remain a matter of doubt, then, until the matter has been passed upon by the upper courts of the states in which they are functioning.

Proctor of the Bar

The office of the Proctor of the Bar for the Eighth Judicial District in New York established in 1936 might be considered a refinement of these court committees. The proctor is a full time, salaried official whose duties include, among others, the investigating and reporting to the Appellate Division on instances of unauthorized practice of law. He is empowered to conduct hearings, administer oaths, take testimony and subpoena witnesses and documents. The work of this new officer is set forth in his first annual report, recently published.[213] The most important legal distinction between the proctor and the court committees previously referred to is, of course, the statutory authorization for his existence and powers.

The Continuing Proceeding

The new devices discussed in this section have related to investigation—to the ascertainment of facts. The proceeding by which relief is granted on the basis of the facts might perhaps be any one of the procedures so far considered in this article. Certain of the committees, however, have made use of a unique procedure, which for want of a better name has been designated a "continuing proceeding." The proceeding is entitled *"In re Unauthorized Practice of Law in..... County"* and is given a certain docket number. When the committee has a complaint to make against an alleged unauthorized practitioner, it comes in, reports the facts to the court and asks that appropriate relief be given (usually by injunction). The courts then issue an order to the defendant requiring him to appear and show cause why the relief should not be granted. The only reported case considering this method of proceeding was *Morton v. Beery*,[214] in which the defendant urged that there was no "action" pending before the court which gave it jurisdiction to enter an order, pointing to the constitutional provision prescribing a single form of action in Ohio. The court answered this contention by designating the procedure in question as a "special proceeding" and not affected by the constitutional provision. The court reasoned that a proceeding not authorized by statute and yet designed to exercise the inherent powers of the court must be a special proceeding, and pointed out that there was both notice and ample opportunity for a hearing. Hence the court upheld the procedure although no precedent was available.

These proceedings seem to reflect the dictum of Judge Burch, quoted above,[215] that no action in the ordinary sense is involved in a proceeding against unauthorized practice of law. More than any of the other remedies considered they demonstrate the willingness of the courts to adapt their processes to the exigencies of the unauthorized practice campaign.

[212] *Ex parte* Wilkey, *supra* note 72. The circuit court did not have power to appoint a commission to enquire into unauthorized practice of law in the absence of an effective statute or rule of court. Such an enabling rule was later announced. See (1937) 3 UNAUTH. PRAC. NEWS 134.

[213] *Supra* note 35.

[214] *Supra* note 208.

[215] *Supra* p. 149.

INDEX

THE "UNAUTHORIZED PRACTICE OF LAW" CONTROVERSY*

* The abbreviations "prac. l." and "un. prac." have been used in this index for "practice of law" and "unauthorized practice of law," respectively.